Supreme Court, U.S.
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No. ———

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Under the Sherman Act, contracts in restraint of trade are illegal. Contracts to divide territories are *per se* illegal. *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972). However, under the state action doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943), a state can immunize some private conduct from antitrust attack as an act of the state as long as (i) the state does not merely ratify private agreements in restraint of trade and (ii) the state clearly articulates its policy curtailing competition and actively supervises the private conduct. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *FTC v. Ticor Ins. Co.*, 112 S. Ct. 2169 (1992). Against this background, this case presents the following questions:

1. Should the decisions below, which uphold state statutes that ratify private contracts dividing retail electric territories, be summarily reversed as contrary to this Court's decision in *FTC v. Ticor*, 112 S. Ct. 2169 (1992), which reversed the opinion of the Third Circuit Court of Appeals in that case and displaced the First Circuit Court of Appeals' decision in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), particularly because the district court relied upon both of these appellate decisions and the Eleventh Circuit Court of Appeals affirmed?

2. Should the decisions below be summarily reversed as contrary to the principles announced by this Court in *Ticor*, *Patrick v. Burget*, 489 U.S. 94 (1988), and *California Retail Dealers Ass'n v. Midcal*, 445 U.S. 97 (1980), because the decisions below provide for no state supervision of private, anticompetitive conduct?

If the opinions of the court of appeals are not vacated summarily, this case presents the following questions for review:

1. If a state grants antitrust exemptions by legislation, may the state give authority to private parties to violate

federal antitrust laws by ratifying private territorial agreements, contrary to the principles announced in *Parker v. Brown*, 317 U.S. 341, 351-52 (1943), that a "state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful?"

2. May a state authorize, by legislation, both overall territorial agreements and separate individual private territorial agreements and the conduct taken pursuant to those agreements, where

> (a) the state had no involvement in formulating either the overall agreements or the individual, separate territorial contracts, some of which were formed decades earlier,
>
> (b) the state had no overall economic or other policy curtailing competition as evidenced by, among other things, the fact that some of the individual territorial contracts conflicted with the overall agreement, and
>
> (c) the state has not supervised the implementation of either the overall or individual agreements, some of which expressly grant the parties to the agreements discretion in allocating territories or customers?

3. Where a state legislature undertakes to exercise supervisory authority typically delegated to regulatory bodies is the legislature held to the same standard of active supervision as a regulatory agency created by it would be?

4. Should the Court revisit the scope of the state action doctrine announced in *Parker v. Brown*, 317 U.S. 341 (1943)?

## PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the Eleventh Circuit and herein include the following:

Petitioners

The City of Alexander City, Alabama
The City of Andalusia, Alabama
The City of Bessemer, Alabama
The City of Brundidge, Alabama
The City of Courtland, Alabama
The City of Decatur, Alabama
The City of Dothan, Alabama
The City of Evergreen, Alabama
The City of Fairhope, Alabama
The City of Florence, Alabama
The City of Hartford, Alabama
The City of Huntsville, Alabama
The City of Lafayette, Alabama
The City of Lanett, Alabama
The City of Lincoln, Alabama
The City of Opelika, Alabama
The City of Piedmont, Alabama
The City of Robertsdale, Alabama
The City of Tuscumbia, Alabama
The Electric Board of Guntersville, Alabama
The Electric Board of the City of Muscle Shoals, Alabama
The Electric Board of the City of Luverne, Alabama
The Electric Board of the City of Hartselle, Alabama
The Fort Payne [Alabama] Improvement Authority
The Municipal Utilities Board of Albertville, Alabama
The Scottsboro [Alabama] Electric Power Board
The Utilities Board of the City of Sylacauga, Alabama
The Utilities Board of the City of Tuskegee, Alabama
The Utilities Board of the City of Opp, Alabama
The Utilities Board of the City of Foley, Alabama
The Utilities Board of the City of Cullman [Alabama], Inc.

Respondents:

Alabama Electric Cooperative, Inc.
Alabama Power Company
Alabama Rural Electric Association of Cooperatives
Arab Electric Cooperative, Inc.
Baldwin County Electric Corporation
Black Warrior Electric Membership Corporation
Central Alabama Electric Cooperative
Cherokee Electric Cooperative
Clarke-Washington Electric Membership Corporation
Coosa Valley Electric Cooperative, Inc.
Covington Electric Cooperative, Inc.
Cullman Electric Cooperative
Dixie Electric Cooperative
Franklin Electric Cooperative
Joe Wheeler Electric Membership Corporation
Marshall-DeKalb Electric Cooperative
North Alabama Electric Cooperative
Pea River Electric Cooperative
Pioneer Electric Cooperative, Inc.
Sand Mountain Electric Cooperative
South Alabama Electric Cooperative, Inc.
Southern Pine Electric Cooperative
Tallapoosa River Electric Cooperative
Tombigbee Electric Cooperative, Inc.
Wiregrass Electric Cooperative, Inc.

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**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners pray that a *Writ of Certiorari* issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINIONS BELOW

The May 23, 1994 opinion of the court of appeals (Appendix A, 1a-8a) is reported at 21 F.3d 384. The March 4, 1992 decision of the court of original jurisdiction, the United States District Court for the Middle District of Alabama (Appendix B, 9a-26a), is unreported. The July 5, 1991 opinion of the court of appeals (Ap-

pendix D, 29a-51a) is reported at 934 F.2d 1493. The January 9, 1990 decision of the United States District Court for the Middle District of Alabama (Appendix E, 52a-70a) is unreported.

## JURISDICTION

The court of appeals rendered its decisions on May 23, 1994 and on July 5, 1991. Rehearing on the May 23, 1994 judgment was denied on August 26, 1994. (Appendix C, 27a-28a). This court has jurisdiction under 28 U.S.C. § 1254(1)(a) (1988).

## STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Sherman Act, 15 U.S.C. §§ 1 and 2 (Supp. II 1990), and the Clayton Act, 15 U.S.C. § 26 (1988), are reproduced as Appendix F (71a) and Appendix G (72a), respectively. Ala. Code §§ 37-14-1 to -17 (1992) is reproduced as Appendix H. (73a-96a). Ala. Code §§ 37-14-30 to -40 (1992) is reproduced as Appendix I. (97a-125a).

## STATEMENT OF THE CASE

1. *Factual Background*: This case involves challenges under the Sherman Act, 15 U.S.C. §§ 1 and 2 (Supp. II 1990), and the Clayton Act, 15 U.S.C. § 26 (1988), to two acts passed by the Legislature of Alabama (hereinafter "the Legislature") prescribing procedures for the establishment of exclusive retail electric service areas. The legislation establishes general rules for dividing electric territories. The legislation also incorporates sixteen private agreements that were previously entered into by various electric suppliers and governs the division and allocation of exclusive retail electric service areas.

Petitioners include 30 Alabama municipalities, public corporations or boards which own and operate electric distribution facilities and the City of Lincoln which would like to enter the electric distribution business (hereinafter

collectively referred to as "the Cities"). Each of these municipal electric systems competes, or potentially competes, with Alabama Power Company ("APC"), Alabama's largest wholesale and retail electric company, or with rural electric cooperatives.

The Cities brought suit against APC, twenty-two rural electric cooperatives and the electric cooperatives' statewide association, the Alabama Rural Electric Association of Cooperatives, (all collectively referred to as "APC/Coops") seeking declaratory and injunctive relief and damages for violations of the Sherman and Clayton Acts.

The Cities alleged that APC/Coops had entered into an agreement to divide, horizontally, retail electric service territories in Alabama between themselves, constituting a *per se* violation of the federal antitrust laws. The Cities further alleged that APC/Coops acted jointly to enforce their illegal territorial agreement against the Cities by securing ratification of the sixteen private agreements submitted to the Alabama Legislature that were ultimately passed as part of the 1984 Service Territories for Electric Suppliers Act (hereinafter "the 1984 Act") and the 1985 Service Territories for Electric Suppliers Act (hereinafter "the 1985 Act") (collectively referred to as "the Territorial Acts") during the 1984 and 1985 regular legislative sessions.[1] The separate private agree-

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[1] Prior to 1984, Alabama had no legislation authorizing the assignment of exclusive retail electric service areas. In 1984, the Legislature enacted the Service Territories for Electric Suppliers Act for the stated purpose of limiting wasteful electric line duplication. (73a-96a). The 1984 Act prescribed procedures for the establishment of exclusive service territories for Alabama's retail electric suppliers. This legislation was subsequently held invalid by the United States District Court for the Middle District of Alabama and enjoined from enforcement. *Dixie Elec. Coop. v. Citizens of the State of Alabama*, Civil Action No. CV 84-V-891-N (M.D. Ala. Nov. 2, 1984). The Eleventh Circuit subsequently found, however, that the case had been wrongfully removed from the state court to federal court, and vacated the district court's

ments were exceptions to the general provisions of the Territorial Acts; these agreements were incorporated by reference and made part of the Territorial Acts.[2]

The Cities also alleged—notwithstanding the preambles to the Acts that approve the private agreements and state that the purpose of the legislation is to avoid adverse impacts from the "duplication of electric distribution facilities used for the furnishing of retail electric service"—that the purpose of the Territorial Acts and the private agreements incorporated into the Acts is to eliminate competition. Ala. Code § 37-14-1 and -30. (73a-74a, 97a-98a).[3]

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judgment. *Dixie Elec. Coop. v. Citizens of Ala.*, 789 F.2d 852 (11th Cir. 1986).

While the decision holding the 1984 Act invalid was on appeal in 1985, the Legislature enacted a second Service Territories for Electric Suppliers Act in an effort to address the infirmities that had been identified by the federal district court. (97a-125a). The 1985 Act stated that if the courts determined that the 1984 Act was constitutional, with a few specified exceptions, those provisions of the 1985 Act that were inconsistent with the 1984 Act would no longer be effective. (124a-125a).

[2] The 1984 Act incorporated by reference twelve private agreements which it referred to as "Exemptions." The 1985 Act listed a total of fifteen agreements, eleven of which were originally listed in the 1984 Act and four of which were additions. The private agreements incorporated by the Legislature into the Territorial Acts differ substantially from the general provisions of the Territorial Acts. While some of the private agreements were executed relatively contemporaneously with the enactment of the general provisions of the Territorial Acts, other private agreements had been entered into many years before the passage of the Acts.

[3] Although the Territorial Acts themselves do not bar duplicative electric lines, the Acts do prevent competition. For example, the Territorial Acts tacitly allow line duplication by permitting sales by APC/Coops to certain large and desirable electric customers located within the Cities. The Cities cannot, however, similarly compete for large customers outside their territories. The Territorial Acts also allow for the elimination of competition in other ways that do not prevent line duplication. *See* Affidavit of Dr. John W. Wilson (Appendix M, 145a-157a). For example, the Cities are prohibited from granting a franchise to a new utility that is

The Territorial Acts permit each city's primary electric supplier to purchase the electric distribution facilities of other suppliers within the municipality as of the date of enactment of the Act. (79a-84a, 105a-112a). Outside city limits, electric suppliers cannot serve premises already served by another supplier. For a new customer, the electric utility whose lines are closer to the prospective customer must serve that customer. However, APC/Coops may compete in other suppliers' assigned service areas to serve new large industrial customers whose "loads" exceed 2500 kilowatts. (77a-78a, 102a-103a). These customers are particularly valuable. The Territorial Acts prohibit a city from serving any customer outside its service boundaries, even if the city annexes new territory. In addition, the Acts effectively prevent the formation of new electric systems by, among other means, preventing municipalities from forming new municipal systems or franchising utilities other than existing suppliers. (153a-155a).

In addition, the private agreements that the Legislature incorporated by reference into the Territorial Acts also eliminate competition. The private agreements divide

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attempting to displace an existing electric supplier. Under the Acts, no matter how inferior service or price may be, a utility has a right to continue to serve in an area. As is set forth in the Affidavit of Dr. John W. Wilson, a well-known economist and expert on the electric power industry who served as Chief of the Federal Power Commission's Division of Economic Studies, stated in the record that such competition to win a franchise has nothing whatsoever to do with preventing wasteful facilities duplication and, therefore, unnecessarily and improperly removes a powerful tool for inducing efficient performance by the franchise owner.

Dr. Wilson testified as to the important competition which exists in the electric utility industry and the harmful effects on the Cities and the public at large from its elimination. To the extent that head-to-head competition to prevent line duplication is eliminated, Dr. Wilson testified to the lower courts that, "it therefore makes it even more imperative to protect and nurture the kinds of competition (especially franchise competition) that remain, so as to avoid the likely evolution of exorbitant costs and rates due to a complete insulation of suppliers from market incentives." (156a).

territories. The agreements also (i) substantially alter the service area assignments that would have existed in the affected areas under the general provisions of the Territorial Acts and (ii) in some instances authorize future revisions to service area boundaries or reassignments of customers by the electric suppliers who are parties to the private agreements.[4]

*Agreements effecting substantial departures.* Two of the incorporated private agreements illustrate the substantial departures from the service area assignments that would have been effected under the general provisions of the Territorial Acts. (Appendix K, 139a-141a; Appendix L, 142a-144a). The Covington/Elba Agreement provided that Covington could retain certain electric distribution facilities located within Elba City limits and could serve new premises that were located within two hundred fifty feet of Covington's retained distribution lines. Elba was allowed to serve a 47 acre tract outside of the city limits, in essence, as "compensation" for agreeing not to purchase certain of Covington's electrical distribution facilities within the City. (139a-141a). Similarly, under the APC/Southern Pine Agreement, the parties agreed that Southern Pine would retain certain areas within the Cities of Brewton and Flomaton, Alabama, that would otherwise have gone to APC under the Territorial Acts and that APC would serve certain areas outside these Cities that were closer to Southern Pine's electrical lines. (142a).

*Agreements authorizing future revisions.* Three private agreements expressly authorize the parties themselves to make future revisions to their territorial allocations with-

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[4] **The district court construed the language in the 1985 Act that "no subsequent agreement shall be valid unless and until it has been reviewed by the legislature and the legislature has amended this section to mandate the implementation of the provisions of such agreement," Ala. Code § 37-14-36 (113a-116a), as meaning that even those customer or territorial allocations contemplated under the individual private agreements, and presumably any discretionary decisions implementing the agreements, would require additional legislative approval. (21a).**

out additional authorization from the Alabama Legislature. (Appendix J, 126a-137a). Under the terms of the Tarrant City/APC Agreement, the City of Tarrant City would distribute electricity to all residential customers within its corporate limits as of June 8, 1983 (as indicated on a map attached to the agreement) (137a), and, subject to certain exceptions, to all non-residential customers within these areas. The Agreement further provides for annexations and makes exceptions within certain specified areas based upon the size of customer load, including giving an election to certain customers to purchase electricity from APC. In addition, if the parties agree, upon the request of the customer APC may serve new customers having loads of less than 5,000 kw in the City's service area. (133a-134a).

The Southern Pine/Evergreen Agreement pertains to an area that, at the time of the Agreement's adoption, was soon to be annexed into the City of Evergreen. The Agreement provides that Southern Pine would continue to serve its existing customers within the annexed area, "as well as all new customers located along . . . [then] existing lines within three hundred feet (300′) from the edge of the right-of-way of street or road, or the lots, or city blocks existing along the lines . . . [then] used by Southern Pine . . ., provided, however, that any new industry who might locate in these areas shall be negotiated as to who will serve the industry . . . [sic]" by the City and Cooperative. (150a).

Likewise, the Cullman Utilities Board/Cullman Electric Cooperative Agreement establishes a boundary separating the service areas of the electric suppliers to the Agreement. The Agreement provides that if either party refuses to make service available to a prospective customer in the party's assigned service area, the other party may, after submission to it by the prospective customer of proof of the other supplier's refusal to serve, commence the service to the customer upon certain notice requirements. Further, where one party extends lines into another's service area, "the service area boundary established by this agree-

ment shall be considered *automatically* revised . . . ." (151a) (emphasis supplied).

In addition to the Cities' contentions that the express provisions under the private agreements allow the parties to those agreements to reallocate customers, the Cities contended that practical circumstances would make the exercise of private discretion in allocating customers inevitable. For example, maps under old agreements have reference points that have become dated or that no longer exist.

The Cities alleged that there is no state supervision provided in implementing the territorial divisions negotiated by the parties to the private agreements. Of course, there could be no current legislative involvement in the formation of the private agreements that were entered into before the enactment of the general provisions of the Territorial Acts, one of which dates back to 1940. The Territorial Acts show on their faces that the Acts merely declared legal the earlier private agreements, as those agreements had been drafted.

Moreover, the Cities alleged that there was no evidence that the Legislature had all of the private agreements when the Territorial Acts were passed, thereby making it impossible for the Legislature to scrutinize the private agreements for consistency with the Territorial Acts.[5] In addition, although the private agreements were listed by name and date in the legislation, these agreements were never

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[5] Copies of the private agreements that were incorporated by reference in the bills that were enacted as the 1984 and 1985 Acts, respectively, at the times those bills were introduced in the Legislature, were delivered to the offices of the Clerk of the House of Representatives and the Secretary of the Senate of Alabama, respectively; however, other private agreements were added to each of these bills by amendment, and there is no evidence that copies of those agreements added by amendment were similarly delivered. There also is no evidence that the members of both houses of the Legislature were informed that copies of the private agreements were available for review.

recorded as having been read in a legislative session,[6] nor were they assigned to and reviewed by any legislative committee, nor were the merits of the provisions of the private agreements ever debated, nor do the texts of any of the private agreements appear in any legislative journals or official records. *See* 1984 Ala. House J. 32, 127, 1404-05; 1984 Ala. Senate J. 207, 322, 405, 594, 703, 1144; 1985 Ala. House J. 25-26, 89, 273, 282-83, 288, 293-96, 300, 2181-82, 2205-06, 2339; 1985 Ala. Senate J. 29-30, 146, 232, 545, 684, 706.

The private agreements also are not readily available to the customers of the parties to the agreements. The agreements do not appear in the legislative acts or in the codifications of those acts nor are the agreements on file in the Legislature or the Alabama Public Service Commission.[7] Further, the agreements have not been reviewed or approved by the Alabama Public Service Commission. In fact, obtaining the agreements from the parties themselves is the only source of access to the agreements available to customers of the parties of which the Cities are

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[6] Ala. Const. of 1901, art. IV, § 63, provides in pertinent part that "Every bill shall be read on three different days in each house, and no bill shall become a law, unless on its final passage it be read at length . . . ." The texts of the private agreement were not in the bills that ultimately were enacted as the Territorial Acts and were not, therefore, ever read to either house of the Legislature.

[7] In this respect, the Territorial Acts differ materially from rules and regulations adopted by the Legislature pertaining to electric cogeneration facilities and cogenerators, *i.e.*, applicable provisions of the regulations which had been promulgated as of July 6, 1983, by the Federal Energy Commission under Sections 201 and 210 of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. § 796(17)-(22) and 16 U.S.C. § 824 a-3 (Supp. 1994); such regulations being embodied in 18 C.F.R. §§ 292.101 to -.602. Ala. Code § 37-12-3 (1992). In that instance, the Legislature said:

> A copy of said regulations, as compiled and published in 18 Code of Federal Regulations Part 292 as of July 6, 1983 and incorporated in a volume entitled "Regulations Relating to Cogeneration Facilities Adopted for the State of Alabama," shall be maintained by the secretary of the Alabama Public Service Commission.

aware. Because of the failure of the Legislature to review the private agreements, the Cities contended that the statement in the 1984 Act and the 1985 Act that the agreements "have been reviewed by the legislature" is an empty recitation, and nothing more. (86a-88a, 113a-115a). The Cities' contentions were supported by the deposition testimony of Senator Eugene "Crum" Foshee, the Senate chief sponsor and floor leader for the Territorial Acts in the *Dixie Elec. Coop. v. Citizens of Ala.*, CV-84-575-PR (Circuit Court of Montgomery County, Alabama) case as follows:

Q. As the sponsor of the legislation, how did you determine what contracts would be included in Section 7?

A. Those contracts that were agreed on and put in the bill. I didn't draw up the bill, you understand that.

* * * *

Q. Well, is it your testimony that someone other than you decided which agreements would go into the bill?

A. Yes.

Q. And when you say someone other than you, do you mean someone outside of the Legislature?

A. Yes.

* * * *

Q. Were you satisfied with your ability then to determine whether or not they were consistent with the purposes of the Act after you—

A. I would say I am not able to determine, but I accepted the fact that several different parties apparently agreed to something, nobody came forward and argued against them so I assumed they were legitimate agreements.

Q. Okay. And when you say that several different parties had agreed to them, are you talking about the actual parties to the contracts themselves?

A. Yes.

Q. Okay. And because they had agreed to them, you considered that they were sufficient to be included within Section 7 of the Act?

A. I would think so, yes.

The Cities further contended not only that the sixteen private agreements were the product of unsupervised private action, but there is no provision in the Territorial Acts for state supervision of the implementation of the overall agreements. The general provisions of the Territorial Acts provide that within nine months of the effective date of the Territorial Acts maps were to be exchanged by electric suppliers showing their distribution facilities as of January 1, 1984. (78a, 103a-104a). However, there was no repository established where interested parties could find the maps, no state supervision of the drawing or implementation of these maps and no exchange of a substantial number of the maps. There is no provision, as there is in other states, for Alabama's Public Service Commission (or other state agency) to review the implementation of the territorial agreements, enforcement of the agreements, modification of the agreements, or resolution of disputes arising under the agreements.[8]

2. *Proceedings Below*: In the District Court for the Middle District of Alabama and on appeal to the Eleventh Circuit Court of Appeals, the Cities challenged the APC/Coops' agreements to divide territories for retail electric service as *per se* violations of the federal antitrust laws. APC/Coops claimed that their conduct was protected

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[8] The Cities alleged that the "reverse" severability clauses contained in the Territorial Acts, (95a-96a, 124a), under which if any part of the Territorial Acts were subsequently held to be invalid, the Acts would be rendered wholly invalid, provide further evidence that rather than representing any broad public policy, the Territorial Acts were intended only to ratify private agreements. Under this clause, if any one of the separate private agreements is disallowed, the Territorial Acts fail in their entireties. The Cities contended that this unusual provision was to ensure that each of the parties got the benefit of its bargain.

under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), which excludes from antitrust coverage state action to displace competition with regulation or monopoly service. APC/Coops also relied on the *Noerr-Pennington* doctrine, which protects certain acts of petitioning the government to secure favorable action. *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

The Cities contended (i) that their action was not barred either by the state action or the *Noerr-Pennington* doctrines and (ii) that although the state may supplant competition with regulation, under *Parker* and its progeny, a state may not merely declare private anticompetitive conduct to be lawful or to "rubber-stamp" private antitrust violations; any private antitrust violations that are "authorized" must be the product of and actively supervised by the state. *Patrick v. Burget*, 486 U.S. 94 (1988); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).[9] The Cities argued that *Noerr-Pennington* was inapplicable, because the Cities were not challenging APC/Coops' acts of lobbying but were challenging their acts of entering into and enforcing private territorial agreements as prohibited by *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and later by *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).

On appeal from the district court's first judgment in this case, the court of appeals held:

> A state statute limiting competition will not run afoul of the Sherman Act provided that: (1) the challenged state statute was implemented pursuant to a clearly articulated state policy restraining com-

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[9] APC/Coops, relying on *Hoover v. Ronwin*, 466 U.S. 558, argued that if otherwise applied, these cases could be distinguished on the grounds that here the state legislature, and not a subordinate agency, had acted.

petition; and (2) the policy was actively supervised by the state. *Midcal,* 445 U.S. at 105.

42a.

The court of appeals determined that the state "has control over all of the decisions being challenged by the Cities in this litigation, *e.g.*, to divide service territories inside and outside municipal limits and to limit competition for large industrial customers of electricity." (45a). The court nonetheless held that it could not "determine whether the private agreements [that were incorporated by reference] qualify for state action immunity . . . because the terms of the private agreements are not in the record of this case or in the Alabama Code, . . ." (48a).

On remand, in granting summary judgment for APC/Coops as it had previously, the district court cited the Eleventh Circuit's conclusion "that the Alabama Legislature has exercised sufficient control over the Acts' service territory allocations to satisfy the active supervision test applicable to private parties under *Midcal.*" (13a). The district court also cited the provisions of the Territorial Acts requiring that new private agreements receive legislative approval and the trial court determined that this provision should be read to include discretionary allocations that are allowed under certain of the approved private contracts. (19a). Citing the First Circuit "that a federal court 'should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma. . . .[,]' " (*New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1076 n.18 (1st Cir. 1990)) and the Third Circuit that "[a]vailability of the state action doctrine does not depend upon the quality of state supervision[,]" (*Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122, 1140 (3rd Cir.), *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *rev'd*, 112 S. Ct. 2169 (1992)), the district court held on remand that the incorporated agreements qualified for state action immunity. (19a-21a).

The Cities appealed, relying on this Court's subsequent decision in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169

(1992), reversing the Third Circuit and displacing the First Circuit's *New England Motor Rate Bureau* formulation. The Cities also argued that placing copies of the agreements in the hands of the Clerk of the House and Secretary of the Senate of Alabama, respectively, *at nearly the same time* as the agreements were incorporated into the Territorial Acts afforded—at best—the mere potential for legislative supervision; the Cities argued that such mere potential for supervision was insufficient to constitute state action affording *Parker* immunity. The Cities also challenged the district court's construction of the provision requiring that new private agreements receive legislative approval as applicable to discretionary territorial revisions under the agreements as contrary to both the language of the Acts and of the agreements, which provide expressly for service area modifications.

On appeal, the Eleventh Circuit recognized that the private agreements "authorize the parties to them, by mutual consent, to assign new customers between themselves," and that their provisions would "appear to give the parties the right to allocate new customers without the Legislature's approval." (4a-5a). However, the court affirmed on the ground that the district court had acted reasonably in interpreting the Territorial Acts, thereby sustaining their validity and furthering "the obvious intent of the Alabama Legislature to confer state action immunity to the parties of the incorporated agreements." (7a).[10] The cities sought rehearing on the grounds that

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[10] The Cities argued that the interpretation of the Territorial Acts requiring new legislation to authorize every switch in customers was a contrivance designed to save the Acts but was contrary to the clear meaning of both the Acts and to common sense. For example, under the court's interpretation, parties could go for months without electricity while the Legislature was out of session, assuming that the legislature was prepared to act on individual electric customer allocation questions. By law, the Alabama Legislature meets only 30 legislative days a year during a 105 day session, beginning either in February or April. Ala. Const. of 1901, art. IV, § 48, *amended by* Ala. Const. of 1901 amend. 39, 57, and 339. If a need for amendment arose during the summer, after the legislative

*Midcal* mandated that the Legislature actively supervise the private agreements (or provide a mechanism for their active supervision) that were incorporated into the Acts. Rehearing was denied.

## REASONS FOR GRANTING THE WRIT

## SUMMARY OF ARGUMENT

This case merits review because i) the decisions below directly conflict with a series of opinions of this Court, including the recent decision in *F.T.C. v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), ii) the district court relied upon one decision that has since been reversed and one decision that has since been displaced, and iii) the legislation at issue in this case so clearly does not satisfy the requirements of *Ticor* and *Midcal* that, if left to stand, the decisions below could provide a pathway for private parties to obtain legislative antitrust exemptions.

For example, under the lower courts' decisions, it would be permissible for automobile companies, computer manufacturers, or other competitors to establish market divisions throughout Alabama for the sale of automobiles, computers or any other products, if they could get the state legislature to ratify their deals. For the same reason that such territorial agreements would not be allowed in the automobile market, such agreements should not be allowed in the electric industry. *See FTC v. Superior Trial Lawyers Ass'n*, 493 U.S. 411, 424-25 (1990) (holding that anticompetitive private agreements do not become protected under the *Noerr-Pennington* doctrine merely be-

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session ended, the parties might be unable to amend their agreement until the following spring. The Cities pointed out that there was no vehicle for notice in either the Acts or the contracts so that the Legislature or interested parties could become aware of territorial or customer transfers. The court recognized the problem but nevertheless affirmed the district court's construction of the statute that the Legislature (itself) intended to review all future modifications (*i.e.*, implementations) of the contracts. (7a-8a).

cause parties seek legislative approval after entering into the agreements).[11] Thus, the lower court decisions distort the core of the *Parker* doctrine: states may displace competition with regulation, but states may not use the doctrine to authorize private violations of the Sherman Act. *Parker*, 192 U.S. at 351-352.

Likewise, permitting the market divisions at issue here would be directly contrary to the *Midcal* requirements that private anticompetitive activity allowed under the state action doctrine must be both actively supervised and undertaken pursuant to a clearly articulated state policy. *Midcal*, 445 U.S. 97. When there is no state policy supplanting competition with regulation or monopoly service, state public service commission ("PSC") approval does not remedy Sherman Act violations. *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976) (no state policy existed; only a permissiveness that allowed the company to act anticompetitively or not as it chose). Here, not even the potential for PSC or state agency review of private utilities' anticompetitive activity is provided. *See Ticor*, 112 S. Ct. 2169 (finding illegality because of inadequate regulatory review).

Petitioners request a grant of *certiorari* and summary reversal because the decisions in this case conflict directly with this Court's decision in *Ticor*, and a host of other cases, which mandate that *if* the states are to be allowed, in effect, to override the Nation's antitrust laws, the private anticompetitive conduct insulated by the state must be actively supervised. The insistence on *active* supervision is to ensure that the private conduct does, in fact, implement policies established by the state and does not constitute conduct undertaken for private purposes over which the state has merely cast a protective or "gauzy" cloak of state involvement. *Midcal*, 445 U.S. at 105-106; *Ticor*; *Patrick v. Burget*, 486 U.S. 94.

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[11] *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

If this Court does not act summarily, the case warrants review because the decisions below allow states to override federal antitrust law by ratifying private agreements to divide territories, or any other agreements contrary to the antitrust laws, provided that they act by legislative, as opposed to administrative, action. *Parker* and the state action doctrine permit states to substitute regulatory schemes for competition. However, if the doctrine can be read as a license for states to approve anticompetitive private agreements, then the states will have a license to override the antitrust laws at the behest of local industry or special interest groups. Indeed, the decisions of the courts below suggest that had the parties in *Ticor* merely gone to the Legislature and gotten a state law authorizing their conduct, even if the law provided for no supervision, their conduct would be legal. (7a-8a, n.4).

Alert that under the *Parker* doctrine the states are effectively providing antitrust exemptions, this Court, in *Ticor*, held that in providing immunity, the states must give real and not facial supervision to protected conduct. Petitioner Cities respectfully submit that if the Court believes that there may be grounds to limit *Ticor* so that it should not apply to legislative action with the same rigor as to administrative action, then it is important that the Court review this question. Otherwise, states will be given full license to override the antitrust laws by passing private benefit legislation.

Finally, the Cities suggest that if the Court is inclined to believe that the *Parker-Midcal-Ticor* tests have been met (although it is clear that they have not), it may be time to revisit the state action doctrine. An examination of the cases and comments about them suggest that a better analysis than the traditional formulations would be to accept or reject state action based upon whether that action promotes a clear state regulatory or other governmental policy or simply promotes private interests.

## I. THE DECISIONS BELOW ARE CLEARLY CONTRARY TO THE SHERMAN ACT AND THE RECENT DECISIONS OF THIS COURT; THEREFORE, A GRANT OF *CERTIORARI* AND SUMMARY DISPOSITION IS WARRANTED AND REQUESTED

By granting motions to dismiss, which were treated as summary judgment dispositions without any factual hearing, the lower courts have sanctioned a private overall territorial agreement and, in addition, sixteen separate private territorial agreements that are *per se* illegal under the antitrust laws. *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972). *See also Gainesville Utils. Dep't v. Florida Power & Light Co.*, 573 F.2d 292 (5th Cir.) *cert. denied*, 439 U.S. 966 (1978).

The Sherman Act has long been recognized as providing "a comprehensive charter of economic liberty." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958). These principles were recognized most recently in *Ticor*, 112 S. Ct. at 2176. While there are occasional exceptions from its rules providing for competition, these exceptions are to be construed narrowly. *See United States v. Borden Co.*, 308 U.S. 188 (1939).

In *Parker v. Brown*, 317 U.S. 341, this Court announced the state action doctrine, which protects certain state legislative and other actions against antitrust attack when those actions are taken pursuant to a valid state policy to supplant competition with regulation. However, the *Parker* exclusion is limited. *Parker* did not sanction illegal action merely because an arm of the state is involved:

> [A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, *Northern Securities Co. v. United States*, 193 U.S. 197 [1904] . . .

*Id.* at 351-52. *See also Ticor*, 112 S. Ct. at 2176-77; *City of Columbia v. Omni Outdoor Advertising, Inc.*, 111 S. Ct. 1344, 1353-54 (1991); *Midcal*, 445 U.S. at 104, 106; *City of Lafayette, La. v. Louisiana Power & Light*

*Co.*, 435 U.S. 389, 416 (1978), *overruled in part on other grounds Hallie v. Eau Claire*, 471 U.S. 34 (1985); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951).

In *Midcal*, this Court imposed a two-part test under which challenged antitrust conduct that is purportedly protected by the state action doctrine must be taken pursuant to a "clearly articulated" state policy and must be "actively supervised." These requirements were to ensure that challenged actions in fact represented state action and not private action "masquerading" as action of the state. The Court further explained the rationale behind its requirement of *active* state supervision of would-be anticompetitive private conduct in *Patrick v. Burget*, 486 U.S. at 100-01:

> The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie v. Eau Claire*, 471 U.S. 34, 47 (1985); see *id.*, at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.*, at 46-47. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct . . . [citation omitted]; *Parker v. Brown, supra*, at 352 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board). . . . Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Most recently, in *Ticor*, this Court reiterated that for private conduct to be protected under the state action doctrine "actual state involvement, not deference" to private arrangements is the "precondition." 112 S. Ct. at 2176-77. "Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint." *Id.* at 2177.

Against this background, it is apparent that the decisions below are directly contrary to the Sherman Act, to *Ticor*, and to multiple other decisions of this Court. *Patrick*, 486 U.S. 94; *City of Lafayette*, 435 U.S. 389; *Midcal*, 445 U.S. 97 (1980); *Cantor*, 428 U.S. 579; *Topco*, 405 U.S. 596 (1972); *Schwegmann Bros.*, 341 U.S. 384 (1951).

The courts below sanctioned private action that is plainly illegal under the antitrust laws. The private territorial agreements were merely ratified or rubber-stamped by the Alabama Legislature. No review of the agreements occurred. This suggestion of review was merely a recitation in the legislation. *Parker v. Brown* permits state action, including state regulatory actions that implement policies of the state; it does not permit, however, the states, in the words of *Parker*, to "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.[12]

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[12] This Court has similarly ruled that the *Noerr-Pennington* doctrine cannot be used to allow parties to protect private agreements from antitrust scrutiny by entering into them and then seeking legislative ratification, as was the case here. As this Court said in *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1990), *quoting Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. at 503 (1988):

> If all such conduct were immunized then, for example, competitors would be free to enter into horizontal price agreements as long as they wished to propose that price as an appropriate level for governmental ratemaking or price supports. *But see Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-463 (1945). Horizontal conspiracies or boycotts designed to exact higher prices or other economic advantages from the

The Eleventh Circuit, in its July 5, 1991 opinion, viewed the *Midcal* test as the means of ensuring that states do not merely ratify anticompetitive private action. (48a). However, the courts below were satisfied with an articulated state policy that was merely an acceptance of agreements that had been previously entered into by the parties. In fact, different agreements would have been equally acceptable. As is apparent from the face of the Territorial Acts, the territorial divisions were approved by the Legislature because they had been agreed to privately.

The courts below also allowed implementation of private territorial allocations where there was *no* state supervision of private discretion on the theory that the state could later ratify proposed territorial changes. This theory was adopted in spite of allegations that territorial maps as required under the Territorial Acts (that sanctioned the private agreements and shielded the agreements from antitrust attack) were not reviewed by the Legislature, were not available for public view and, indeed, in many instances were never exchanged. Simply stated, the potential for any state corrective action or oversight of the agreements was theoretical at best. As neither the overall nor the individual agreements were supervised when they were entered into or will be supervised in their implementation, the decisions below are directly contrary to this Court's decision in *Ticor*.

The Cities are aware that this Court does not sit as a court of general review. However, the decisions below are so contrary to recent precedent of this Court and involve such a significant area of law that summary reversal is warranted. Reversal is warranted because of the Eleventh Circuit's affirmance of the district courts' decision that cited and relied upon the Third Circuit's decision in *Ticor* —a decision subsequently overturned by this Court. 112

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**government would be immunized on the ground that they are genuinely intended to influence the government to agree to the conspirators' terms. *But see Georgia v. Evans*, 316 U.S. 159 (1942).**

S. Ct. 2180. Although this Court had overturned the Third Circuit's *Ticor* decision in June of 1992 (nearly two years before the Eleventh Circuit's May 23, 1994 decision in this case) the Eleventh Circuit neither discusses nor even cites this Court's *Ticor* opinion. This is in spite of the fact that the Cities had claimed that this Court's decision is controlling and in spite of the district court's reliance on the vacated Third Circuit decision. Had this Court's decision in *Ticor* been decided before the district court's May 4, 1992, decision, which was affirmed by the Eleventh Circuit by relying on the trial court's discretionary reading of the Territorial Acts, it is unlikely that the district court would have found the private agreements immune from antitrust attack. If the lower courts' decisions are allowed to stand, other courts will be encouraged to interpret the *Midcal* test as allowing for exception. In addition to leading to unnecessary litigation to determine the location of an undiscernible line between enough and not enough supervision, basic antitrust policy as established by this Court will be undermined.

## II. IF THE ELEVENTH CIRCUIT IS NOT SUMMARILY REVERSED, THE COURT SHOULD REVIEW WHETHER STATES MAY PROVIDE PRIVATE PARTIES WITH ANTITRUST PROTECTION BY PASSING LEGISLATION THAT DOES NOT CONFORM TO THE *PARKER, MIDCAL* AND *TICOR* TESTS; ALTERNATIVELY, THE COURT SHOULD RE-EXAMINE THE SCOPE OF THE *PARKER* STATE ACTION DOCTRINE

This case involves an issue that may never have been presented to the Court in quite the same way–whether the mere potential for legislative scrutiny or review of private, otherwise *per se* anticompetitive, conduct constitutes state action sufficient to confer *Parker* immunity. In other words, if the mere potential for scrutiny of private conduct by an administrative agency is insufficient to confer state action immunity, *see Ticor*, is the mere potential for scrutiny by the state's legislature sufficient to con-

fer state action immunity where the legislature, rather than a subordinate agency, acts?

The district court, saying "The [c]ourt finds that the incorporated territorial agreements were available for study and review by the members of the Alabama Legislature and the public at or prior to the passage of the Acts," in effect, held that the mere potential for legislative scrutiny of the private agreements had been sufficient to confer state action immunity upon them. (14a). The Cities pointed out to the district court, as well as to the Eleventh Circuit, that the placement of copies of certain of the private agreements in the offices of the Clerk of the House and the Secretary of the Senate of Alabama, respectively, constituted the gauziest cloak of state involvement, particularly when (1) there was no official record or evidence that even all of the agreements had been delivered to the Clerk and the Secretary; (2) there was no official record or evidence that both houses of the Legislature had been informed that copies of the agreements were available for review; (3) informal readings by individual legislators (even if it could be shown that these occurred) does not equate to "review" by the Legislature; and (4) the Legislature tacitly admitted the paucity of its scrutiny or involvement in its finding expressed in the legislation that the private agreements had been "found not to be inconsistent with the purposes and policies set forth in . . . [the Acts]." (86a-88a, 113a-116a). Nonetheless, both lower courts were willing to rely upon the fact that certain of the private agreements were available for review by members of the Alabama Legislature as sufficient to confer antitrust immunity.[13]

In *Ticor*, this Court dispelled the mistaken notion that had been embraced by a number of lower courts that the

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[13] The Cities stressed that they were not asking the court to assess the wisdom of the Legislature's action but to determine objectively whether the Legislature had reviewed the agreements at all. The Cities argued that to exempt the agreements from the antitrust laws there must be some review of the challenged agreements.

mere potential for regulatory review was sufficient to confer state action immunity. In this case, guidance from the Court is urgently needed to dispel the equally mistaken notion that the mere potential for review of private anticompetitive conduct by individual legislators was sufficient to confer state action immunity. Further, guidance is needed to confirm that the established "articulated policy" and "state supervision" requirements are still in full force.

There is a suggestion in the decisions below that the lower courts recognize, as they must, the conflict between their decisions and the *Midcal-Ticor* requirements. However, because the approvals of the APCo/Coops' territorial agreements and the actions taken under them were accomplished by legislation, the lower courts may have felt that these private anticompetitive actions were entitled to protection. Thus, for example, in note 4 of the Eleventh Circuit's 1994 decision, the court rejected out-of-hand that it must determine "whether the Legislature, in incorporating the agreements into the Acts by reference, exercised sufficient independent judgment and control so that the details of these service area assignments were established as a product of deliberate state intervention." (7a-8a, n.4). The court cited *Hoover v. Ronwin*, 466 U.S. at 567-68, as "holding that, under the *Parker* doctrine, a state legislature's actions are *ipso facto* exempt from the operations of the antitrust laws, because its actions constitute those of the state." (7a-8a, n.4). Likewise, the district court, which was affirmed by the Eleventh Circuit, stated its disinclination to question whether the Legislature had, in fact, reviewed the agreements. ("[T]his Court looks to the terms of the agreements and not to the process by which they were incorporated into the Acts.") (15a-16a). Further, although the statutes approved the private market divisions, which on their faces provided for unsupervised private

discretion, the court felt itself duty-bound to interpret the Territorial Acts as though such discretion did not exist.[14]

Apart from the issue of whether the Legislature in fact reviewed the agreements, the courts below (i) permitted the Legislature to ratify private anticompetitive conduct, contrary to *Parker* and (ii) failed to apply the *Midcal* tests, contrary to *Ticor*. If, however, under *Hoover v. Ronwin*, or otherwise, this Court deems that the prohibitions against states rubber-stamping private antitrust violations may be inoperative where there is legislative action or that the Legislature may ignore *Midcal*, then important issues of statutory interpretation and of national policy are raised that mandate this Court's review. Such exclusion of legislation from the *Ticor* and *Midcal* standards would permit states, at the behest of private parties, to circumvent the national policy in favor of antitrust enforcement. Because such private legislation can often aid local industry at the expense of companies elsewhere and at the expense of commerce, such exemption from the antitrust laws should not be readily presumed.

Further, denial of *certiorari* will leave standing the lower courts' decisions that failed to consider *Ticor*, and therefore, conflict with the decisions in other circuits that have recognized the need to apply *Ticor*. *See, e.g., Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260 (3rd Cir. 1994) (evaluating state commission's articulated policies and supervision against the requirements of *Ticor*) and *DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir. 1993), *cert. denied sub nom. United States Metroline Servs. v. Southwestern Bell Tel. Co.*, 114 S. Ct. 183 (1993) (applying *Ticor*, as required by this Court, and determining that

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[14] **The courts' creative interpretation of the Territorial Acts as mandating legislative review of future private discretion is reminiscent of the Lord High Chancellor's statutory construction in Gilbert and Sullivan's *Iolanthe*. In *Iolanthe*, a clear misconstruction of the law causes love to triumph and nobody to be hurt. Here, a misconstruction causes the antitrust laws to be overridden at the expense of competition and causes Petitioner Cities to be hurt.**

Texas' regulatory scheme is a far cry from the passive regulatory schemes condemned in *Ticor*).

There are tensions between the state action doctrine of *Parker*, the Congressional mandate of antitrust enforcement and the principles of federalism: the enforcement of *Midcal's* two-prong test is intended to ameliorate this tension. Strict adherence to *Midcal* can help ensure that, except where there is a considered decision by the states to substitute regulation for competition, the antitrust laws are applied. The carving out of an exception to *Ticor* and *Midcal* any time state legislation is involved will exacerbate the tensions, because it will allow for conduct violative of the antitrust laws whenever a private interest is sufficiently powerful to "capture" a state legislature. The result will be to allow private parties to secure preferential legislation eliminating competition, regardless of its consistency with the antitrust laws. The implication of preferential legislation on the principle of federalism and antitrust enforcement was commented on persuasively in John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986). *See also FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (upholding antitrust liability where defendants engaged in a prohibited boycott at the suggestion of government officials that was designed to influence government).[15]

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[15] Based upon an analysis of numerous antitrust cases Professor Wiley has concluded that although *Parker* is designed to protect valid state regulatory authority, as an operative matter its "sweeping protection of state authority has not endured." John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 719 (1986). He counts eight cases of this Court after *Parker* that "have subjected to federal antitrust review local practices that represented 'state policy' in the sense that one concerned with local autonomy would use the term." *Id.* at 719-20. His conclusion is that a better framework for analysis would be to inquire whether the state's insulating conduct involves government regulation or private benefit legislation. *Id. See also* Professors Areeda and Turner's suggestion that in *Parker* cases the courts have been balancing state and federal interests. Phillip Areeda and Donald F. Turner, *Antitrust Law.* ¶215(c) (1978) (Supp. 1993).

Review is warranted of the lower courts' creation of a significant exemption to the *Ticor* and *Midcal* holdings. The contrary conclusion will encourage private legislation and economic balkanization and indeed will create pressure on state legislatures to grant exemptions at the behest of parochial local interests.[16]

A separate reason for granting *certiorari* in this case stems from the importance of the electricity industry. The electric power industry is perhaps our nation's largest industry, has a pervasive impact on our economy, and provides an essential product to virtually every American. It is often assumed that the electric industry is totally monopolized and that there is little room for competition. However, to the contrary, numerous courts, agencies, commentators and economic studies have found that both wholesale and retail competition may exist, even in the face of territorial limitations on service, so that a decision based on the presumption of the inapplicability of competition cannot stand. *See, e.g., Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *City of Mishawaka, Ind. v. American Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980). *See also Consumers Power Co.* (Midland Units 1 and 2), 6 N.R.C. 892 (Appeal Board 1977) (reviewing antitrust law affecting the electric power industry). *See also* Dr. Wilson's affidavit. (145a-157a). It is noteworthy that the California Public Service Commission has ordered that large electric users will have a choice of electric suppliers beginning in 1996 and every residential

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For different reasons, Professor Wiley and Professors Areeda and Turner suggest based on analysis, that the *Parker* test is not being applied and needs review. In his concurring opinion in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. at 2180 (J. Scalia, concurring), Justice Scalia suggests the same conclusion.

[16] To the extent that the courts below seek to protect states' abilities to enact substantive economic legislation, Petitioners do not disagree. However, considering that the state action doctrine immunizes conduct that is otherwise illegal under federal antitrust law, claims that courts should not look at whether the state in fact reviewed or supervised the conduct to be protected cannot stand. *See Ticor*, 112 S. Ct. 2169.

electric customer will have such a choice by the year 2002. *Order Instituting Rulemaking on the Commission's Proposed Policies Governing Restructuring of California's Electric Services Industry and Reforming Regulation*, Case R. 94-04-031, I. 94-04-32, — CPUC — (April 20, 1994). The State of Michigan has ordered a "retail wheeling experiment" to assess the benefits and harms of increased retail competition. *Association of Businesses Advocating Tariff Equity ("ABATE") v. Detroit Edison Co.*, Case NU-10143, *et al.* — MPSC — (April 11, 1994).

Petitioners submit that this Court should not, without review, leave standing decisions that seriously threaten retail competition in an industry where further competition is emerging and where the actions of the private parties to secure antitrust exemptions, and of the state to ratify them, fall totally outside the antitrust laws and the governing principles established by this Court. Here, the state could have established articulate principles to limit retail electric competition with adequate supervision of departures from competitive norms, but it did not.

Various states and municipalities have regulatory regimes limiting electric retail competition. *See, e.g., Gainesville Utils. Dep't. v. Florida Power & Light Co.*, 573 F.2d 292. However, almost uniformly, these schemes are supervised by a state regulatory agency to ensure conformance to public policy. Absent correction by this Court, it can be anticipated that additional utilities will seek legislative approval to, in effect, do their own regulating.

An additional reason for granting *certiorari* in this case stems from this Court's decision in *City of Columbia v. Omni Outdoor Advertising*, 111 S. Ct. 1344. In *Columbia*, this Court held that the "co-conspirator" doctrine did not provide grounds for exemption from *Parker*, but the Court reaffirmed that states may not merely ratify private party antitrust actions and the viability of the *Midcal* doctrine. The corollary to this Court's decision in

*Columbia* is that the *Ticor-Midcal* tests will be strictly applied. Otherwise, as has happened in Alabama, an invitation will be given for governments to condone antitrust violations and for private parties to seek government protection of their illegal acts.

Finally, *certiorari* should be granted to make clear that the state cannot provide parties with a state action shield to antitrust enforcement when parties have failed to comply with the very law that purportedly creates the shield. Otherwise, a party can defend against antitrust claims on the basis of a state statute with which the party has failed to comply.[17]

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[17] The Territorial Acts provide that affected parties exchange service area maps, but the Cities allege that this never occurred. This failure allows APC/Coops to draw maps after the fact or worse to allocate customers at will—a practice clearly contrary to the antitrust laws and their enforcement.

Supreme Court, U.S.
FILED

No. 94-956 NOV 25 1994

OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

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THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## APPENDIX TO

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## APPENDIX A

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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No. 92-6268

MUNICIPAL UTILITIES BOARD OF ALBERTVILLE; THE CITY OF ALEXANDER CITY; THE CITY OF ANDALUSIA; THE CITY OF BESSEMER; THE CITY OF COURTLAND; THE UTILITIES BOARD OF THE CITY OF CULLMAN, INC.; THE CITY OF DECATUR; THE CITY OF DOTHAN; THE CITY OF EVERGREEN; THE CITY OF FAIRHOPE; THE CITY OF FLORENCE; THE UTILITIES BOARD OF THE CITY OF FOLEY; THE FORT PAYNE IMPROVEMENT AUTHORITY; THE ELECTRIC BOARD OF THE CITY OF HARTSELLE; THE CITY OF HUNTSVILLE; THE CITY OF LAFAYETTE; THE CITY OF LANETT; THE ELECTRIC BOARD OF THE CITY OF LUVERNE; THE ELECTRIC BOARD OF THE CITY OF MUSCLE SHOALS; THE CITY OF OPELIKA; THE UTILITIES BOARD OF THE CITY OF OPP; THE CITY OF PIEDMONT; THE CITY OF ROBERTSDALE; THE SCOTTSBORO ELECTRIC POWER BOARD; THE UTILITIES BOARD OF THE CITY OF SYLACAUGA; THE CITY OF TUSCUMBIA; and THE UTILITIES BOARD OF THE CITY OF TUSKEGEE,

*Plaintiffs-Appellants,*

v.

ALABAMA POWER COMPANY; THE ALABAMA RURAL ELECTRIC ASSOCIATION OF COOPERATIVES; DIXIE ELECTRIC COOPERATIVE; COVINGTON ELECTRIC COOPERATIVE, INC.; MARSHALL-DEKALB ELECTRIC COOPERATIVE; SOUTHERN PINE ELECTRIC COOPERATIVE; CHEROKEE ELECTRIC COOPERATIVE; CULLMAN ELECTRIC COOPERATIVE; PIONEER ELECTRIC COOPERATIVE, INC.; TOMBIGBEE ELECTRIC COOPERATIVE, INC.; WIREGRASS ELECTRIC COOPERATIVE, INC.; JOE WHEELER ELEC-

TRIC MEMBERSHIP CORPORATION; CLARKE-WASHINGTON ELECTRIC MEMBERSHIP CORPORATION; TALLAPOOSA RIVER ELECTRIC COOPERATIVE; PEA RIVER ELECTRIC COOPERATIVE; CENTRAL ALABAMA ELECTRIC COOPERATIVE; SAND MOUNTAIN ELECTRIC COOPERATIVE; FRANKLIN ELECTRIC COOPERATIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; BALDWIN COUNTY ELECTRIC MEMBERSHIP COOPERATIVE; COOSA VALLEY ELECTRIC COOPERATIVE; SOUTH ALABAMA ELECTRIC COOPERATIVE, INC.; BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION and ARAB ELECTRIC COOPERATIVE, INC.; ALABAMA ELECTRIC COPERATIVE, INC.,
*Defendants-Appellees.*

---

Appeal from the United States District Court
for the Middle District of Alabama

---

May 23, 1994

---

Before TJOFLAT, Chief Judge, KRAVITCH Circuit Judge, and RONEY, Senior Circuit Judge.

PER CURIAM:

I.

This is an antitrust action brought by thirty Alabama municipalities (the "Cities") against the Alabama Power Company and twenty-two rural electric cooperatives,[1] all of whom are suppliers of electricity in the retail electric market. The Cities claim that two Alabama statutes, 1984 Ala. Acts 206 (the "1984 Act"), codified as Ala.Code §§ 37-14-1 to -17 (Michie 1992), and 1985 Ala. Acts 645 (the "1985 Act"), codified as Ala.Code §§ 37-14-30

[1] The Cities also sued the cooperatives' association, the Alabama Rural Electric Association of Cooperatives. For convenience, we refer only to the defendants named in the text.

to -40 (Michie 1992) (collectively, "the Acts"), run afoul of the Sherman Act, 15 U.S.C. §§ 1, 2 (1988), because the statutes incorporate fifteen agreements between two suppliers of electricity (of which one or both are defendants in this litigation) that allocate service territories and, thus, eliminate competition among such suppliers in those areas.

In an earlier proceeding, we agreed with the district court that the state action immunity doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), as applied in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), controlled the disposition of this case. *Municipal Util. Bd. of Albertville v. Alabama Power Co.,* 934 F.2d 1493, 1501-02 (11th Cir. 1991). As a result, we examined the legislation to determine whether, as the district court held, *Midcal*'s two-part test barred the Cities' claims for relief. *Id.* at 1502-05.

The first part of *Midcal*'s test asks whether the challenged legislative enactment implements a clearly articulated state policy to restrain competition; the second part asks whether the state has actively supervised the anticompetitive conduct. *Midcal,* 445 U.S. at 105, 100 S.Ct. at 943. We concluded that the Acts challenged here satisfied the first prong of the *Midcal* test because "[t]he Alabama legislature has clearly articulated a policy to displace competition in the retail electric market" in order "to prevent duplication of electric facilities." *Municipal,* 934 F.2d at 1502. We were unable to determine, however, whether the second part of the *Midcal* test was satisfied because the private agreements, which the Acts incorporated, were not in the record. For this reason, we could not tell whether these agreements authorized the parties, in implementing them, to engage in anticompetitive conduct that would not require the state's prior approval. We therefore remanded the case to the district court for a resolution of this issue. We told the court

that, if the implementation of the incorporated agreements satisfied the second *Midcal* requirement, dismissal of the suit would be proper. *Id.* at 1504-05.

On remand, the district court examined the agreements in question, concluded that the requisite state supervision of the implementation of the agreements was present, and dismissed the case. The Cities now appeal, challenging this conclusion. We affirm.

II.

Only three of the agreements the Acts incorporate are involved in this appeal. These agreements authorize the parties, by mutual consent, to assign new customers between themselves. The first is the Agreement between Tarrant City, Alabama, and the Alabama Power Company dated June 8, 1983, which assigned all new customers having an initial contract demand of less than 5,000 kilowatts to the city:

> [P]rovided, however, if [Tarrant] City and [the Alabama Power] Company mutually agree, upon request for such agreement by the customer, that service by Company could be provided in a manner which minimizes the potential for duplication of electric facilities, then service to such customer shall be provided by the Company.

The second is the Agreement between the Southern Pine Electric Cooperative, Inc., and the City of Evergreen, Alabama, which assigned to Southern Pine all existing customers, and all new customers locating within 300 feet of Southern Pine's then existing electrical lines, within an area then proposed to be annexed by the City:

> [P]rovided, however, that any new industry which might locate in these areas shall be negotiated as to who will serve the industry by the Governing Bodies of the City of Evergreen and Southern Pine Electric Co-op.

The third is the Agreement between the Utilities Board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954, which, in relevant part, established a boundary separating the service areas of the Utilities Board and the Cooperative and provided that, if either party refused to make service available to prospective customers in its service area, the other party might, after submission to it by the prospective customer of proof of the refusal, and after giving six months' notice, commence serving the customer.

Standing alone, the provisions we have quoted appear to give the parties the right to allocate new customers without the Legislature's approval. These provisions, however, do not stand alone, as the district court concluded; they must be read *in pari materia* with the incorporating provision of the 1985 Act, section 37-14-36. That section states:

> The separate agreements listed below which have heretofore been entered into between, or negotiated between retail electric suppliers, have been reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article. In areas to which these agreements are applicable, the procedures for elimination and prevention of duplication of electric distribution facilities set forth in these agreements shall govern. The following agreements are therefore mandated by the State of Alabama to be applicable:
>
> . . . .
>
> (3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983 regarding electric service areas in and around Tarrant City, Alabama.
>
> . . . .

> (13) Agreement between Southern Pine Electric Cooperative, Inc. and the City of Evergreen, Alabama as such agreement is reflected in the resolution of the city council of the City of Evergreen dated June 6, 1967 relating to electric service in the City of Evergreen.
>
> . . . .
>
> (15) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.
>
> . . . .
>
> Subsequent to May 20, 1985 [the effective date of the 1985 Act], suppliers [of electricity] shall be permitted to enter into mutual agreements, approved by the respective governing bodies of all suppliers affected by the agreements, respecting the nonduplication of lines, that are consistent with the purposes and policies set forth in this article; *provided, however, that no subsequent agreement shall be valid unless and until it has been reviewed by the legislature.*

Ala.Code § 37-14-36 (Michie 1992 (emphasis added). Under the 1985 Act, therefore, the Alabama Legislature must explicitly approve any customer allocations the parties might wish to make.

The Cities urge us to reject the district court's conclusion—that section 37-14-36 covers the implementation of these agreements—because it makes no practical sense.[2] Under the district court's approach, the Cities observe, it might take months before the Legislature could approve the parties' agreement as to which party should serve a new customer; consequently, the customer might go without electricity.

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[2] The Cities concede that section 37-14-36 would cover the parties' "new" agreements; that is, agreements not made in the process of implementing the existing agreements.

Notwithstanding this possibility, we reject appellants' argument. The district court's interpretation is consistent with the plain language of the statute. When construing a state statute, we look to state rules of statutory construction, because the same rules of construction apply in a federal court as would apply in a state court. *See Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 125 (5th Cir.1980).[3] Under Alabama law, statutes are presumed valid, and a reviewing court must adopt the construction of a legislative enactment that will sustain its validity. *See House v. Cullman County*, 593 So.2d 69, 71-72 (Ala. 1992). The district court faced a choice between two reasonable interpretations of the statute; it chose the interpretation that sustained the Act's validity and furthered the obvious intent of the Alabama Legislature to confer state action immunity to the parties of the incorporated agreements. Had the court interpreted the Acts as not requiring legislative approval of the parties' implementation of the three agreements, the Acts would not have conferred state action immunity. Although legislative approval of a customer allocation might be delayed, in a given case, it is not our province to condition immunity from antitrust prosecution on the wisdom of the Legislature's decision. *See Hoover v. Ronwin*, 466 U.S. 558, 574, 104 S.Ct. 1989, 1998, 80 L.Ed.2d 590 (1984) (noting that state need not act "wisely" to be immune).

We therefore hold that the private agreements in question in this case qualify for state action immunity.[4] Ac-

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

[4] The Cities also argue that, in applying the second part of *Midcal's* test, we must determine whether the Legislature, in incorporating the agreements into the Acts by reference, exercised sufficient independent judgment and control so that the details of these service area assignments were established as a product of

cordingly, we affirm the decision of the district court dismissing the Cities' case.

IT IS SO ORDERED.

---

deliberate state intervention. This claim is patently meritless and warrants no discussion. *See Hoover*, 466 U.S. at 567-68, 104 S.Ct. at 1995 (holding that, under the *Parker* doctrine, a state legislature's actions in adopting legislation are *ipso facto* exempt from operation of antitrust laws, because its actions constitute those of the state). *See also City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377-78, 111 S.Ct. 1344, 1352-53, 113 L.Ed.2d 382 (1991) (refusing to engage in a subjective analysis of a city's decision because it "would require the sort of deconstruction of the governmental process" that the Supreme Court has consistently sought to avoid).

## APPENDIX B

[Filed Mar. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

---

Civil Action No. 89-H-519-N

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, *et al.*,

*Plaintiffs,*

v.

ALABAMA POWER COMPANY, *et al.*,

*Defendants.*

---

## MEMORANDUM OPINION

In its July 5, 1991 opinion, the Eleventh Circuit affirmed this Court's prior holding that the general provisions of Ala. Code §§ 37-14-1 *et seq.* (1984 Act) and §§ 37-14-30 *et seq.* (1985 Act) satisfy the two-part test for state action immunity articulated by the Supreme Court in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *See Municipal Utilities Bd. v. Alabama Power Co.*, 934 F.2d 1493, 1504 (11th Cir. 1991). In addition, the Court of Appeals held that the provisions of the Acts referring to specified pre-existing agreements satisfy the clearly articulated state policy requirement of *Midcal*. 934 F.2d at 1502. The Eleventh Circuit, however, could not determine based upon the record before it whether the private agreements satisfied the active supervision prong of the *Midcal* test. The Court of Appeals thus reversed and remanded the case for proceedings to determine whether

the private agreements qualified for state action immunity.[1]

The private agreements were submitted on October 11, 1991, in full text to this Court as part of defendant Alabama Power Company's renewal of its motion to dismiss and alternative motion for summary judgment. The Alabama Power Company (APC) also submitted the affidavit of Michael L. Menk. The issues on remand have been briefed fully by the parties, and the Court conducted a hearing to allow the parties to argue their positions.

## BACKGROUND OF THE ACTS AND INCORPORATED AGREEMENTS

The provisions of the Acts which are the subject of this remand are Section 37-14-36 (incorporating separate agreements into the 1985 Act) and Section 37-14-8 (incorporating separate agreements into the 1984 Act). The agreements incorporated into each Act by these sections were, according to the Alabama Legislature, "reviewed by the Legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article." *Ala. Code* §§ 37-14-36 and 37-14-8. Both the 1984 and the 1985 Acts were passed for the purpose of eliminating duplicative electric facilities. The determinations by the Alabama Legislature were credited by the Eleventh Circuit in its discussion of the clearly articulated state policy issue, 934 F.2d at 1502 (citing *Ala. Code* §§ 37-14-8 and 37-14-36), and this Court also credits the Legislature's findings insofar as they bear on the issue of active state supervision.

The Acts address (1) those electric service activities existing outside municipal limits as of April 26, 1984; (2) those electric service activities inside existing muni-

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[1] The Eleventh Circuit also reversed the denial of the City of Lincoln's motion to intervene.

cipal limits, and (3) those electric service activities contained in private agreements incorporated by reference into the Acts.[2]

The agreements incorporated into the two Acts involve various combinations of municipal electric suppliers, rural electric cooperatives, Alabama Power Company, and, in one instance, the Tennessee Valley Authority. Municipalities in the State of Alabama are parties to eight of the fifteen agreements incorporated into the 1985 Act and five of the twelve agreements incorporated into the 1984 Act. In several instances, municipalities which appear as plaintiffs in this proceeding challenging the Acts in general and the incorporated private agreements in particular are also parties to the agreements. For example, the cities of Andalusia, Bessemer, Brundige, Cullman and Evergreen are all parties plaintiff in this proceeding and each of them was a party to an agreement listed in Section 37-14-36 of the 1985 Act. A list of the agreements is attached as an appendix.

As with the Acts, the incorporated agreements typically recite that they were entered into to eliminate inefficient duplication of electric distribution facilities. *See, e.g.*, Agreement among City of Bessemer, Alabama Power Company and TVA dated as of August 12, 1971 (recognizing "wasteful and undesirable duplication of facilities"); Agreement between City of Tarrant City and Alabama Power Company dated as of June 8, 1983 (reciting parties' desire to "eliminate to the fullest extent possible consistent with the public interest duplication of Company's and the City's facilities with corresponding preservation of and improvement in aesthetic and environmental values and improvement in electric service reliability"); Agreement between Cullman Electric Cooperative and

---

[2] Because the issue on remand concerns only those private agreements incorporated into the acts, the Court will only address those private agreements and not the general provisions already addressed by the Eleventh Circuit. *See* 934 F.2d at 1497.

Alabama Power Company dated as of January 2, 1984 (referring to "wasteful and undesirable duplication of facilities").

Most of the incorporated agreements reflect that they were executed around the time the Acts were adopted and state that they would become null and void if not approved and adopted by the Alabama Legislature. *Ala. Code* § 37-14-8(4)-(11) and § 37-14-36(4)-(12). These agreements generally address the duplication of facilities by delineating specific geographic boundaries and granting each party the exclusive right to serve customers in an assigned area. Some of the agreements illustrate these boundaries with maps accompanying the agreements. Several of the agreements executed contemporaneously with the Acts also grant one electric supplier the option of purchasing facilities of the other in particular areas. The provisions of these agreements established the terms and conditions under which the purchase option could be exercised.

The remaining agreements incorporated into the Acts were entered into prior—in some cases, many years prior —to the adoption of the Acts.

Both the 1984 and 1985 Acts state that the legislature intended to incorporate specific procedures for the elimination of duplication of electric facilities from certain listed agreements as those agreements existed at the time the Acts were passed. The operative sections of both Acts refer to the agreements as having "heretofore" been negotiated by retail electric suppliers. Each listed agreement is incorporated by reference to both the identity of the parties and the date of the agreement. Both Acts permit the adoption of additional agreements which are consistent with the purposes and policies of the Acts, but no such new agreement may "be valid unless and until it has been reveiwed by the Legislature and the Legislature has amended this section to mandate the implementation of the provisions of such agreement." *Ala. Code*

§§ 37-14-36, 37-14-8. The 1985 Act also provides that if any of the listed agreements are terminated, the general rules of the 1985 Act will govern thereafter.

## DISCUSSION

The Eleventh Circuit concluded that the general provisions of the Acts reflect that the Alabama Legislature has exercised sufficient control over the Acts' service territory allocations to satisfy the active supervision test applicable to private parties under *Midcal*. The Court of Appeals stated that the general provisions of the Act have "placed no decision-making authority over restraints on competition in the hands of private parties," and that such provisions set forth precise procedures for electric suppliers to follow in implementing the service area allocations promulgated by the Legislature. 934 F.2d at 1053. For the following reasons, this Court determines that these same findings can be made as a matter of law with regard to the incorporated agreements and thus that the agreements qualify for state action immunity.

The Court treats the defendants' motions as motions for summary judgment. As the discussion below indicates, the Court determines that "no genuine issue as to any material fact" exists. Fed.R.Civ.P. 56(c). The issue remanded by the Eleventh Circuit is one of law. The only facts added to the record consequent to this case's remand are those contained in the incorporated agreements. The actual contents of the agreements are not in dispute. Rather, the dispute between the parties is whether the terms of these agreements are sufficient to comply with the legal standard set out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

## RELEVANCE OF CIRCUMSTANCES OF INCORPORATION OF AGREEMENTS

Plaintiffs contend that the private agreements were initiated and produced by private parties rather than by the Legislature, and thus the Court should examine the circumstances surrounding the Legislature's review of the agreements. Plaintiffs further allege that because they originated with private parties, the private agreements reflect the interests of the individual parties and are not designed to represent or promote the legislative goals embodied by the Acts. Therefore, plaintiffs maintain, the Legislature had a duty to scrutinize the private agreements to ensure that they promote or, at least, do not contravene the purposes of the Acts.

The Court finds that the incorporated territorial agreements were available for study and review by the members of the Alabama Legislature and the public at or prior to the passage of the Acts. Although Section 37-14-8 of the 1984 Act recites that the agreements incorporated by reference had been "reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article," the texts of the agreements were not set out in the 1984 Act. The same is true of Section 37-14-36 of the 1985 Act. The parties, however, have stipulated that "following introduction but prior to final passage by the Legislature of Alabama of the bills that became Act No. 84-206, §§ 37-14-1 through 17, *Code of Alabama 1975* ("the 1984 Act"), and Act. No. 85-645, §§ 37-14-30 through 40, *Code of Alabama 1975,* ("the 1985 Act"), representatives of the Alabama Power Company and of the plaintiff Cooperatives delivered to the offices of the Clerk of the House of Representatives and the offices of the Secretary of the Senate of Alabama copies of the agreements listed in Section 7 of said bills as said bills read upon their first readings in the houses of the Legislature of Alabama in which they were respectively introduced." Defendant's Response to Plaintiffs'

Assertions Concerning Availability of Territorial Agreements.

In *Parker v. Brown,* 317 U.S. 341, 351 (1943), the Supreme Court held that Congress did not intend the Sherman Act to prohibit states from restraining competition. A state, however, may " 'not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' " *City of Columbia v. Omni Outdoor Advertising, Inc.,* —— U.S. ——, 111 S.Ct. 1344, 1353 (1991) (quoting *Parker,* 317 U.S. at 351). In order for a state to limit competition without violating the Sherman Act, a statute restraining competition must be implemented pursuant to a clearly articulated state policy to do so, and this policy must be supervised actively by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105 (1980).

As stated by the Eleventh Circuit, "[t]he second prong of the *Midcal* test requires that the state actively supervise any private anticompetitve conduct taken pursuant to the regulatory scheme." 934 F.2d at 1502. To determine whether the active state supervision requirement is met, the Court should examine "whether private parties or public authorities made the operative decisions regarding the challenged anticompetitive conduct." *Id.* at 1503. In other words, when the state creates such regulatory schemes, it must ensure that private parties retain no decision-making authority over restraints in competition.

In examining the general provisions of the Acts, the Eleventh Circuit did not look to the process by which the Legislature adopted the Acts or the level of scrutiny with which individual legislators reviewed their provisions. Rather, the Court of Appeals explored whether electric suppliers would exercise any private regulatory power under the terms of the Acts. Similarly, in order to assess whether the incorporated agreements also meet the active state supervision prong of the *Midcal* test, this

Court looks to the terms of the agreements and not to the process by which they were incorporated into the Acts.

Therefore, the Court declines the Municipalities' invitation to go behind the Legislature's statements in the Acts that it reviewed the agreements and found them to be in the public interest and not inconsistent with the Acts' purposes. Such an inquiry regarding the circumstances of the Legislature's incorporation of these agreements is not relevant to the task at hand: determining whether the terms of the agreements provide for active state supervision.

ACTIVE STATE SUPERVISION REQUIREMENT

In *Patrick v. Burget,* 486 U.S. 94 (1988), the Supreme Court elaborated upon the requirements of the active state supervision prong of the *Midcal* test:

> [T]he active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. . . . The mere presence of some state involvement or monitoring does not suffice. See *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 345, n. 7 (1987) (holding that certain forms of state scrutiny of a restraint established by a private party did not constitute active supervision because they did not "exer[t] any significant control over" the terms of the restraint. The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.

486 U.S. at 101. The Court thus must determine whether the term of the agreements ensure that state officials have and exercise the authority to review any action taken under the incorporated agreements by the parties thereto.

Plaintiffs assert that the procedures contained in the incorporated private agreements do not control sufficiently

the exercise of future discretionary behavior by electric suppliers so as to satisfy the active supervision requirement.

Plaintiffs allege that several of the private agreements incorporated into the Acts vary substantially from the general provisions of the Acts by allowing unsupervised anticompetitive conduct that is inconsistent with the stated policies and purposes of the Acts. They cite as examples: (1) the agreement between APC and Pea River Electric Cooperative, (2) the agreement among Covington Electric Cooperative, the City of Eyba, Alabama and the City of Elba Water and Electric Board, and (3) the agreement between APC and Southern Pine Electric Cooperative.

Plaintiffs also contend that some agreements authorize independent revisions or ongoing, discretionary, anticompetitive conduct of the parties to the private agreements as being violative of the second prong of *Midcal*. In this regard, plaintiffs cite the agreements between the City of Tarrant City and APC, the City of Evergreen and SPEC and the Utilities Board of the City of Cullman and Cullman Electric Cooperative.

Defendants maintain that the boundaries established by the agreements are fixed and leave no room for meaningful private discretion. They respond that the agreement between Tarrant City and APC and the agreement reflected in the city council resolution adopted June 6, 1967 by the City of Evergreen contain fixed procedures for the elimination of duplication. In the case of the Tarrant City agreement, defendants point out that the procedures rely on a set of maps and other objective criteria to describe the territory of the respective electric suppliers. In the case of the City of Evergreen resolution, the cooperative was allocated new customers located along "present existing lines within 300 feet from the edge of the right-of-way of street or road, of the lots, or city blocks existing along the lines presently owned" by the cooperative.

The Court agrees with defendants' contention that the procedures contained in the incorporated agreements, like the general rules embodied in the Acts, sufficiently control the exercise of future discretionary behavior by electric suppliers to satisfy the active supervision requirement. The operative provisions of the incorporated agreements rely on fixed rules, references to known geographic boundaries such as county lines or city limits, or references to specific maps containing boundary lines or shaded areas to indicate each electric supplier's territory. Therefore, §§ 37-14-36 and 37-14-8 "set forth the precise procedures that suppliers must follow to divide service areas," and the incorporated agreements merely draw the lines in different places.

In addition to stating that the terms of the agreements control sufficiently the exercise of future discretionary behavior, defendants argue that the language of §§ 37-14-36 and 37-14-8 regarding review by the Legislature before an agreement may be adopted or changed demonstrates the Legislature's intent to leave no discretion in the hands of electric suppliers to enter into new agreements or to modify the procedures established by the incorporated agreements unless such electric suppliers petition the Legislature for review of the agreements and the Acts are amended to incorporate them.

To the extent that this Court must construe the provisions of the Acts and interpret the incorporated agreements in light of the Acts, the Court must do so in a manner consistent with its duty to "adopt the construction of a statute to bring it into harmony with the Constitution," if the statute's language so permits. *See Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 18 So.2d 810, 815 (1944). *See also NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Applying these principles, the Court must interpret the Acts and incorporated agreements together if such an interpretation is reasonable. In doing so, the Court concludes that the Acts require that modifications of the incorporated agree-

ments be treated as new agreements which cannot become effective without Legislative approval.

Thus, insofar as certain of the private agreements authorize revision or modification by the parties thereto, under the provision of the 1985 Act that "no subsequent agreement shall be valid unless and until it has been reviewed by the Legislature and the Legislature has amended this section to mandate the implementation of the provisions of such agreements," and such revisions must be approved by the Legislature.

The plaintiffs' challenge to both the City of Evergreen and the Tarrant City agreements is based upon a single proviso contained in each agreement. It is not clear at this point that these provisos reflect anything more than an ability of the parties to modify the agreements by mutual consent. For the reasons discussed above, the Court is of the view that any such modification of the procedures contained in the incorporated agreements would require legislative approval under the clear terms of Section 37-14-36 and its counterpart in the 1984 Act. The Acts make it clear that the Legislature intended to incorporate specific procedures from agreements existing at the time the Acts were passed. Particularly in light of the requirement in the 1985 Act that subsequent mutual agreements be approved by the Legislature in order to become effective, this Court finds that the Legislature did not intend to confer unsupervised private discretion on electric suppliers merely because it referred to two agreements which contain the provisos discussed above.

The First Circuit has stated that a federal court "should not scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma. Instead, for many of the reasons that the Supreme Court refuses strictly to scrutinize state economic regulation under the Fourteenth Amendment, the antitrust adjudicatory body must accept the state's apparent supervision on its face." *New England Motor Rate Bureau v. FTC,* 908 F.2d 1064, 1076 n. 18 (1st Cir.

1990). Similarly, in *Ticor Title Insurance Co. v. FTC*, 922 F.2d 1122 (3rd Cir. 1991), the Third Circuit stated:

> Availability of the state action doctrine does not depend upon the quality of state supervision. The principles of federalism and state sovereignty that undergird the doctrine prohibit its selective application only where states act in a manner that a federal agency or federal court finds to be preferable. Instead, the state action doctrine recognizes that states can implement anticompetitive policies, even policies that depend on private actors such as Ticor, free from federal supervision where the state clearly articulates and actively supervises its policy.

922 F.2d at 1140.

The Eleventh Circuit's opinion states that the regulatory system adopted by the states need not be internally consistent to satisfy the *Midcal* test:

> [T]he Supreme Court has never stated that the regulations adopted to displace competition must be perfectly consistent with the articulated policy reasons supporting those regulations. Our inquiry under the first prong of the *Midcal* test is merely whether there is a clearly articulated policy to displace competition, not whether the adopted regulations are the best means to accomplish that policy.

934 F.2d at 1502. In remanding this cause for a determination of whether the incorporated private agreements comply with the *Midcal* test, the Court of Appeals did not suggest that inconsistency with the approach taken in the rest of the Acts would preclude a finding of immunity. The Legislature may use different rules in specific agreements that take account of local conditions or circumstances as part of its overall regulatory program to eliminate future duplication of retail electric distribution facilities, and it is not the proper role of this Court to determine whether the Legislature has chosen the best means to implement its policy.

The Court concludes that the terms of the agreements are fixed and detailed and do not provide room for inconsistent or significant future discretionary behavior by the parties. In addition, where the agreements allow the parties thereto to reach agreements about serving certain customers in particular areas, any changes to the agreements as fixed at the time of their incorporation into the Acts must be reviewed and approved by the Legislature. The combination of clearly delineated procedures and state oversight satisfy this Court that the incorporated agreements meet the active state supervision requirement and thus qualify for state action immunity.

## MUNICIPAL ACTOR DOCTRINE

Because the Court determines that the incorporated agreements are entitled to immunity under the *Midcal* test, it need not reach the question of whether, because municipal entities are parties to many of the agreements incorporated into the Acts, such agreements are not subject to active supervision by the state.

## CONCLUSION

In remanding this case, the Eleventh Circuit made clear that the active supervision requirement, as it applies to the incorporated agreements contained in the Acts, is capable of resolution by motion to dismiss or motion for summary judgment. 934 F.2d at 1504-05.

Pursuant to the foregoing analysis, the Court concludes that defendants' motions for summary judgment are due to be granted because the procedures contained in the incorporated agreements, like the rest of the Acts, leave no room for the exercise of meaningful private discretion over anticompetitive conduct.

A separate order will be entered in accordance with these findings.

DONE this 4th day of March, 1992.

/s/ Truman [Illegible]
United States District Judge

# APPENDIX

Section 37-14-8 incorporates the following twelve separate private agreements into the 1984 Act:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 21, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983, regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Covington Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Enterprise, Alabama.

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Coosa Valley Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Lincoln, Alabama.

(7) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 2, 1984, regarding electric service areas in Ozark, Alabama.

(8) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 2, 1984, regarding electric service in areas of Randolph and Tallapoosa Counties, Alabama.

(9) Agreement among Covington Electric Cooperative, the City of Elba, Alabama, and the City of Elba water and electric board dated as of January 2, 1984, regarding electric service in and around Elba, Alabama.

(10) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 2, 1984, regarding electric service areas in Flomaton and Brewton, Alabama.

(11) Agreement between South Alabama Electric Cooperative, Inc. and the City of Troy, Alabama dated as of October 14, 1983, regarding electric service in areas around Troy, Alabama.

(12) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

Section 37-14-36 incorporates the following fifteen separate private agreements into the 1985 Act [1]:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 12, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983, regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Convington Electric Cooperative dated as of January 18, 1985, regarding electric service areas in Enterprise, Alabama.

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[1] **Of the fifteen private agreements in the 1985 Act, eleven were originally in the 1984 Act, four were additions and one agreement in the 1984 Act was not incorporated into the 1985 Act.**

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1985, regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 18, 1985, regarding electric service areas in Ozark, Alabama.

(7) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 18, 1985, regarding electric service in areas of Randolph and Tallapoosa counties, Alabama.

(8) Agreement among Covington Electric Cooperative, the City of Elba, Alabama, and the City of Elba water and electric board dated as of January 29, 1985, regarding electric service in and around Elba, Alabama.

(9) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 18, 1985, regarding electric service area in Flomaton and Brewton, Alabama.

(10) Agreement between South Alabama Electric Cooperative, Inc., and the City of Troy, Alabama dated as of October 14, 1983, and January 31, 1984, regarding electrical service in areas around Troy, Alabama, and the sale of distribution facilities.

(11) Agreement between Alabama Power Company and Cullman County Electric Cooperative dated as of January 2, 1985 regarding service areas in Cullman and Winston, Counties, Alabama.

(12) Agreement between South Alabama Electric Cooperative, Inc. and the City of Brundidge dated April 11, 1984, regarding electric service in and around the City of Brundidge, Alabama.

(13) Agreement between Southern Pine Electric Cooperative, Inc. and the City of Evergreen, Alabama as

such agreement is reflected in the resolution of the city council of the City of Evergreen dated June 6, 1967, relating to electric service in the City of Evergreen.

(14) Agreement between Covington Electric Cooperative and the City of Andalusia reflected in and reaffirmed by the resolution of the City of Andalusia dated January 29, 1985,

(15) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

[Filed Mar. 4, 1992]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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Civil Action No. 89-H-519-N

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, *et al.*,
*Plaintiffs,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Defendants.*

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ORDER

In accordance with attached memorandum opinion, it is hereby

ORDERED, ADJUDGED AND DECREED that all of those motions to dismiss/motion for summary judgment filed by defendants in the above-styled cause are GRANTED. This cause is hereby DISMISSED. Costs are to be taxed against the plaintiffs.

DONE this 4th day of March, 1992.

/s/ Truman [Illegible]
United States District Judge

**APPENDIX C**

[Filed Aug. 26, 1994]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 92-6268

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D. C. Docket No. 89-H-519-N

MUNICIPAL UTILITIES BOARD OF ALBERTVILLE; THE CITY OF ALEXANDER CITY; THE CITY OF ANDALUSIA; THE CITY OF BESSEMER; THE CITY OF COURTLAND; THE UTILITIES BOARD OF THE CITY OF CULLMAN, INC.; THE CITY OF DECATUR; THE CITY OF DOTHAN; THE CITY OF EVERGREEN; THE CITY OF FAIRHOPE; THE CITY OF FLORENCE; THE UTILITIES BOARD OF THE CITY OF FOLEY; THE FORT PAYNE IMPROVEMENT AUTHORITY; THE ELECTRIC BOARD OF THE CITY OF HARTSELLE; THE CITY OF HUNTSVILLE; THE CITY OF LAFAYETTE; THE CITY OF LANETT; THE ELECTRIC BOARD OF THE CITY OF LUVERNE; THE ELECTRIC BOARD OF THE CITY OF MUSCLE SHOALS; THE CITY OF OPELIKA; THE UTILITIES BOARD OF THE CITY OF OPP; THE CITY OF PIEDMONT; THE CITY OF ROBERTSDALE; THE SCOTTSBORO ELECTRIC POWER BOARD; THE UTILITIES BOARD OF THE CITY OF SYLACAUGA; THE CITY OF TUSCUMBIA; and THE UTILITIES BOARD OF THE CITY OF TUSKEGEE, *Plaintiffs-Appellants,*

versus

ALABAMA POWER COMPANY; THE ALABAMA RURAL ELECTRIC ASSOCIATION OF COOPERATIVES; DIXIE ELECTRIC COOPERATIVE; COVINGTON ELECTRIC COOPERATIVE, INC.; MARSHALL-DEKALB ELECTRIC COOPERATIVE; SOUTHERN PINE ELECTRIC COOPERATIVE; CHEROKEE ELECTRIC COOPERATIVE; CULLMAN ELECTRIC COOPERATIVE; PIONEER ELECTRIC COOPERATIVE, INC.; TOMBIGBEE ELECTRIC COOPERATIVE, INC.; WIRE-

GRASS ELECTRIC COOPERATIVE, INC.; JOE WHEELER ELECTRIC MEMBERSHIP CORPORATION; CLARKE-WASHINGTON ELECTRIC MEMBERSHIP CORPORATION; TALLAPOOSA RIVER ELECTRIC COOPERATIVE; PEA RIVE ELECTRIC COOPERATIVE; CENTRAL ALABAMA ELECTRIC COOPERATIVE; SAND MOUNTAIN ELECTRIC COOPERATIVE; FRANKLIN ELECTRIC COOPERATIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; BALDWIN COUNTY ELECTRIC MEMBERSHIP COOPERATIVE; COOSA VALLEY ELECTRIC COOPERATIVE; SOUTH ALABAMA ELECTRIC COOPERATIVE, INC.; BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION and ARAB ELECTRIC COOPERATIVE, INC.; ALABAMA ELECTRIC COOPERATIVE, INC.,

*Defendants-Appellees.*

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Appeal from the United States District Court
Middle District of Alabama

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: TJOFLAT, Chief Judge, KRAVITCH, Circuit Judge, and RONEY, Senior Circuit Judge

PER CURIAM:

(✔) The Petitions(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
United States Circuit Judge

## APPENDIX D

## UNITED STATES COURT OF APPEALS
## ELEVENTH CIRCUIT

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No. 90-7095

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THE MUNICIPAL UTILITIES BD. OF ALBERTVILLE; THE CITY OF ALEXANDER CITY; THE CITY OF ANDALUSIA; THE CITY OF BESSEMER; THE CITY OF BRUNDIDGE; THE CITY OF COURTLAND; THE UTILITIES BOARD OF THE CITY OF CULLMAN, INC.; THE CITY OF DECATUR; THE CITY OF DOTHAN; THE CITY OF EVERGREEN; THE CITY OF FAIRHOPE; THE CITY OF FLORENCE; THE UTILITIES BOARD OF THE CITY OF FOLEY; THE FORT PAYNE IMPROVEMENT AUTHORITY; THE ELECTRIC BOARD OF GUNTERSVILLE; THE CITY OF HARTFORD; THE ELECTRIC BOARD OF THE CITY OF HARTSELLE; THE CITY OF HUNTSVILLE; THE CITY OF LAFAYETTE; THE CITY OF LANETT; THE ELECTRIC BOARD OF THE CITY OF LUVERNE; THE ELECTRIC BOARD OF THE CITY OF MUSCLE SHOALS; THE CITY OF OPELIKA; THE UTILITIES BOARD OF THE CITY OF OPP; THE CITY OF PIEDMONT; THE CITY OF ROBERTSDALE; THE SCOTTSBORO ELECTRIC POWER BOARD; THE UTILITIES BOARD OF THE CITY OF SYLACAUGA; THE CITY OF TUSCUMBIA and THE UTILITIES BOARD OF THE CITY OF TUSKEGEE,

*Plaintiffs-Appellants,*

CITY OF LINCOLN, ALABAMA,
a municipal corp.,
*Applicant for Intervention-Appellant,*

v.

ALABAMA POWER COMPANY; THE ALABAMA RURAL ELECTRIC ASSOCIATION OF COOPERATIVES; DIXIE

ELECTRIC COOPERATIVE; COVINGTON ELECTRIC COOPERATIVE, INC.; MARSHALL-DEKALB ELECTRIC COOPERATIVE, INC.; SOUTHERN PINE ELECTRIC COOPERATIVE; CHEROKEE ELECTRIC COOPERATIVE; CULLMAN ELECTRIC COOPERATIVE; PIONEER ELECTRIC COOPERATIVE, INC.; TOMBIGBEE ELECTRIC COOPERATIVE, INC.; WIREGRASS ELECTRIC COOPERATIVE, INC.; JOE WHEELER ELECTRIC MEMBERSHIP CORPORATION; CLARKE-WASHINGTON ELECTRIC MEMBERSHIP CORPORATION; TALLAPOOSA RIVER ELECTRIC COOPERATIVE; PEA RIVER ELECTRIC COOPERATIVE; CENTRAL ALABAMA ELECTRIC COOPERATIVE; SAND MOUNTAIN ELECTRIC COOPERATIVE; FRANKLIN ELECTRIC COOPERTIVE; NORTH ALABAMA ELECTRIC COOPERATIVE; BALDWIN COUNTY ELECTRIC MEMBERSHIP COOPERATION; COOSA VALLEY ELECTRIC COOPERATIVE, INC.; SOUTH ALABAMA ELECTRIC COOPERATIVE, INC.; BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION; ARAB ELECTRIC COOPERATIVE, INC. and ALABAMA ELECTRIC COOPERATIVE, INC.,

*Defendants-Appellees.*

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Appeal from the United States District Court
for the Middle District of Alabama

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July 5, 1991

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Before JOHNSON and HATCHETT, Circuit Judges, and DYER, Senior Circuit Judge.

JOHNSON, Circuit Judge:

The plaintiffs, thirty municipal and public corporations and their boards ("the Cities") appeal the district court's order dismissing with prejudice their antitrust complaint

against twenty-two rural electric cooperatives ("the Cooperatives"), the Alabama Rural Electric Association of Cooperatives ("AREA") and Alabama Power Company ("APC").

## I. STATEMENT OF THE CASE [1]

### A. *Background Facts*

The Cities, the Cooperatives, and APC all own and operate electric distribution facilities in the State of Alabama. In 1979, the Alabama Legislature established the Joint Interim Committee on Electricity ("the Committee") to develop legislation "to avoid wasteful, uneconomic duplication of electric facilities, the cost of which must be borne by the consumer." 1979 Ala.Acts 764.[2] In 1984, the Legislature passed the Service Territories for Electric Suppliers Act ("the 1984 Act") for the stated purpose of limiting wasteful duplication. Ala. Code § 37-14-1 et seq. (Supp.1989). The 1984 Act assigned service territories to Alabama's electric suppliers. This legislation was subsequently held invalid by a federal district court

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[1] On March 11, 1991, this Court issued an opinion in this case reversing the district court's dismissal of this case with prejudice and instructing the court to grant the Cities leave to amend their complaint. *Municipal Utilities Bd. of Albertville v. Alabama Power Co.*, 925 F.2d 1385 (11th Cir.1991). In response to the Supreme Court's opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we withheld the mandate and instructed the parties to submit supplemental briefs addressing the effect of *Omni* on the issues in this litigation. We now withdraw our original opinion in this case and issue this corrected opinion in its stead.

[2] The Alabama Legislature instructed the Committee to develop this legislation in consultation with the three principal distributors of electricity in the state, investor-owned utilities, rural electric cooperatives, and municipal electric systems, *e.g.*, APC, the Cooperatives, and the Cities. 1979 Ala.Acts 764.

and enjoined from enforcement.[3] In 1985, the Legislature passed a second Service Territories for Electric Suppliers Act ("the 1984 Act") in an effort to accommodate the constitutional questions raised by the district court. Ala. Code § 37-14-33 (Supp.1989).[4] The Alabama Supreme Court then held that both Acts were valid. *Alabama Power Co. v. Citizens of Ala.*, 527 So.2d 678 (Ala. 1988).

The 1984 and 1985 Acts collectively "the Acts" establish three sets of rules: (1) those governing activities outside existing city limits (*i.e.*, city boundaries as of April 26, 1984); (2) those governing activities inside existing city limits; and (3) those governing the incorporation of certain listed private agreements into the Acts.

The rules governing service outside existing city limits provide that electric suppliers cannot serve premises already served by another supplier. Ala.Code §§ 37-14-3 & 37-14-32 (Supp.1989). These rules also state that electric suppliers cannot extend their facilities to service new premises located in the service area of another supplier, except for industrial customers whose electric loads exceeds 2500 kilowatts. *Id.* The Acts also provide detailed rules to assign specific service areas to each supplier. *Id.*[5]

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[3] This Court subsequently found that this case had been wrongfully removed to federal court, and we vacated the district court's judgment. *Dixie Elec. Coop. v. Citizens of Ala.*, 789 F.2d 852 (11th Cir.1986).

[4] The 1985 Act contains a provision which states that if the courts determine that the 1984 Act was constitutional, then, with a few specified exceptions, those provisions of the 1985 Act that are inconsistent with the 1984 Act will no longer be effective. Ala.Code § 37-14-40 (Supp.1989).

[5] The Acts define the assigned service area as the area "consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in

Finally, the Acts prohibit a municipality from serving any customers outside its boundary, even if the city annexes new territory. *Id.*

The rules governing service inside city limits allow the "primary electric supplier" to purchase the facilities of other suppliers within "existing municipal limits" on terms specified in the statute. Ala.Code §§ 37-14-4 & 37-14-33 (Supp.1989). If the primary supplier elects not to purchase these facilities, the statute permits the secondary supplier to maintain these facilities and become the assigned supplier to those new customers that locate "closer to" its lines. *Id.*

The Acts also contain certain "special rules." Ala.Code §§ 37-14-8 & 37-14-36 (Supp.1989). These rules incorporate into the Acts certain listed agreements ("the private agreements") previously reached by electric suppliers. According to the Acts, these agreements govern the prevention of line duplication in the areas they cover. *Id.* The Acts permit suppliers to enter additional agreements consistent with policies and purposes of the Acts provided the suppliers obtain the approval of the Alabama Legislature. *Id.*[6]

B. *Procedural History*

On May 19, 1989, the Cities filed an antitrust complaint seeking declaratory and injunctive relief and damages against the Cooperatives, AREA, and APC (collectively, "the defendants") for conspiring to suppress competition in the retail electric market in violation of the Sherman Act, 15 U.S.C. §§ 1, 2, and the Clayton Act, 15 U.S.C. § 26. The Cities alleged that the defend-

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whose assigned area the majority of the square footage of the premises falls shall provide the service." Ala.Code §§ 37-14-3(1) & 37-14-32(1) (Supp.1989).

[6] The 1985 Act added certain listed agreements to the agreements incorporated in the 1984 Act. Ala.Code § 37-14-40 (Supp.1989).

ants had illegally agreed to divide service territories horizontally and had conspired with members of the Alabama Legislature as well as officials of state government to immunize this antitrust violation by codifying this illegal agreement as the Acts. The complaint challenged all of the defendants' actions associated with this agreement, including their efforts to petition the Alabama Legislature to pass the Acts and their actions taken pursuant to the Acts. Moreover, the Cities sought an order declaring the Acts invalid and unconstitutional.

APC, AREA, and nineteen of the Cooperatives subsequently moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Specifically, they argued that they were immune from antitrust liability under the *Noerr-Pennington* and state action doctrines. APC also argued that the Cities' claims were time-barred because both Acts were passed more than four years prior to the commencement of the action. Coosa Valley Electric Cooperative ("Coosa Valley") also moved to dismiss, arguing that the Cities lacked standing to assert a cause of action under 15 U.S.C. § 15. The City of Lincoln, Alabama, subsequently filed a motion to intervene.

On January 9, 1990, following a hearing, the district court granted the motions to dismiss with prejudice and denied Lincoln's motion to intervene. The court found that the Cities lacked standing to bring claims for any alleged antitrust injury occurring outside the service areas assigned to them by the Acts, but had standing to bring claims for such injuries within their service areas. Nevertheless, the court dismissed these latter claims, finding that the allegedly actionable conduct was immune from antitrust liability under the *Noerr-Pennington* and state action doctrines.

## II. ANALYSIS

### A. *Standing*

Section 4 of the Clayton Act creates a federal cause of action available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15(a).[7] Standing to bring an antitrust claim is a question of law which we determine by examining the allegations contained in the complaint. *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1448 (11th Cir.1991). It involves more than the "case or controversy" requirement of constitutional standing; it also includes "an analysis of prudential considerations aimed at preserving the effective enforcement of the antitrust laws." *Id.* (citations omitted).

In its order below, the district court found that the Cities lacked standing to assert claims for alleged antitrust injuries occurring outside the service areas assigned to them under the Acts, but had standing to bring claims for such injuries occurring within their statutory service areas. The court reasoned that the Cities had no inherent right to compete in the retail electricity market, but derived their authority to compete solely from a delegation of state power by the Alabama Legislature. *See* Ala.Code § 10-50A-1 *et seq.* (1989 Supp.). According to the district court, the Sherman Act did not limit the Alabama Legislature's authority to restrain or retract this delegation. In its view, by passing the Acts, the Alabama Legislature had merely modified the authority it had previously delegated to the Cities by limiting the area in which and customers for whom the Cities could compete. The court

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[7] The Cities also seek injunctive relief under Section 16 of the Clayton Act which states that "[a]ny person . . . shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws." 15 U.S.C. § 26.

therefore concluded that the Cities suffered no antitrust injury from any allegedly anticompetitive acts outside their statutory service territories outside the areas delegated to them by the Alabama Legislature.[8]

The Cities assert that they have standing to challenge any allegedly anticompetitive acts even if these acts occurred outside their service areas. They argue that once the Alabama Legislature delegated to them the right to compete it may not withdraw such delegation by legislation that violates federal antitrust laws.

Federal courts have labored to establish a precise test to determine whether a plaintiff has antitrust standing. *Austin v. Blue Cross and Blue Shield of Ala.*, 903 F.2d 1385, 1388 (11th Cir.1990). This Court has recently followed a two-pronged approach to decide the issue. *Todorov*, 921 F.2d at 1449. Under this approach, we first determine whether the plaintiff has suffered "antitrust injury." *Id.* We then decide whether the plaintiff is an efficient enforcer of the antitrust laws. *Id.* (citing *Cargill, Inc. v. Monfort*, 479 U.S. 104, 110 n.5, 107 S.Ct. 484, 489 n. 5, 93 L.Ed.2d 427 (1986)); *see also Austin*, 903 F.2d at 1389.

"Antitrust injury is defined as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful.' " *Todorov*, 921 F.2d at 1449 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)). In general, municipal corporations in Alabama are "creatures of the state, and possess no rights, privileges or immunities independ-

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[8] In its brief, defendant Coosa Valley Electric Cooperatives, Inc. ("Coosa Valley") states that the district court's reasoning supports a holding that the Cities lack standing to challenge restrictions or modifications of their existing service areas. Coosa Valley therefore argues that this Court should hold that the Cities have no standing to assert any of their claims in this suit.

ent of those expressly conferred upon them by the state." [9] *City of Safety Harbor v. Birchfield,* 529 F.2d 1251, 1254 (5th Cir.1976)[10]; *State ex rel. Britton v. Harris,* 259 Ala. 368, 67 So.2d 26 (1953). In *Washington v. Seattle School Dist. No. 1,* 458 U.S. 457, 487, 102 S.Ct. 3187, 3203, 73 L.Ed.2d 896 (1982), however, the Supreme Court held that a local elected school board could invoke the Fourteenth Amendment to defend its program of achieving school integration through busing from attack by the state of Washington. While noting that Washington could have reserved to state officials the right to make all decisions regarding public education and student assignment, the Court ruled that, once the state chose to adopt a system delegating control to local officials, it was obligated to operate that system in accordance with the Fourteenth Amendment. *Id.* The decision in *Washington* therefore established the principle that states may not circumscribe or rescind delegated authority in such a way that impairs federally protected rights. *Id.; see also Sailors v. Board of Educ.,* 387 U.S. 105, 109, 87 S.Ct. 1549, 1552, 18 L.Ed.2d 650 (1967) (holding that "unless the state . . . government runs afoul of a federally protected right, it has vast leeway in the management of its internal affairs"); *United States v. State of Ala.,* 791 F.2d 1450, 1456 n. 5 (11th Cir.1986).

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[9] Courts have often cited this principle as a rule that would bar any suit by a creature of the state against its creator. *City of Safety Harbor,* 529 F.2d at 1254. This Court has rejected such a per se rule. *United States v. State of Ala.,* 791 F.2d 1450, 1455 (11th Cir.1986), *cert. denied sub nom.,* 479 U.S. 1085, 107 S.Ct. 1287, 94 L.Ed.2d 144 (1987). Rather, we determine "whether any given constitutional provision or [federal] law protects the interests of the body in question. [But], if no such determination has been made, it is our task to review de novo whether the state entity has any rights under the particular rule invoked." *Id.*

[10] In *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) this Court adopted as binding precedent all decisions of the former Fifth Circuit handed down before October 1, 1981.

The situation in the instant case is analogous to the circumstance presented in *Washington*. Given the importance that the Sherman Act places on free and open competition in the marketplace, once the state of Alabama chose to delegate to the Cities the proprietary right to engage in retail electric sales, it may not rescind that right by legislation that may violate federal antitrust laws. *Washington, supra; Sailors, supra.* Moreover, the district court's delegation analysis is flawed for it has mischaracterized what the Alabama Legislature accomplished by passing the Acts. The Acts did not represent an initial independent decision to rescind or limit the Cities authority to compete in the retail electricity market followed by a second independent decision to impose a regulatory structure suspending competition in the retail electricity market. Rather, these decisions were completely intertwined; the limitation of the Cities' delegated authority to compete in the retail electricty market was a by-product of the regulatory structure dividing service territories. *See* Ala. Code §§ 37-14-3 & 37-14-32 (Supp. 1989). Moreover, the fact that the provisions of the Acts are not severable suggests that the Alabama Legislature intended to limit the Cities' authority to compete in the retail electricity market only by the specific regulatory structure set forth in the Acts. *See* Ala.Code §§ 37-14-17 & 37-14-39 (Supp.1989) (making the Acts invalid if any of the provisions suspending competition and assigning service territories are later held invalid under the constitution or laws of the state of Alabama). If the Acts are determined to violate the antitrust laws, we cannot tell whether the Alabama Legislature would have still chosen to limit the Cities authority to compete in the retail electricity market. The district court therefore erred when it concluded that the Cities had suffered no injury because they were challenging the rescission of delegated state authority.

Nevertheless, we must still determine whether the Cities have antitrust standing under the two-pronged ap-

proach discussed above. The first inquiry is whether the Cities have alleged an antitrust injury.[11] In their complaint, the Cities alleged that the defendants deprived them of the opportunity to compete for future customers by entering into a preexisting, illegal, anticompetitive agreement which divided Alabama into exclusive retail electric territories. The Cities further alleged that this illegal agreement was merely ratified by the Alabama legislature and embodied in the Acts.[12] This injury certainly falls within the class of injuries which the Sherman Act sought to protect against. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). There is a close relationship between the Cities' claimed injury and the alleged antitrust violation; the Acts limit the Cities' ability to compete for future customers by excluding them from territories where they formerly competed. A state may not immunize essentially private anticompetitive conduct from antitrust liability merely by covering it with the "gauzy cloak of state involvement." *Id.* at 106, 100 S.Ct. at 943. Because the Cities claim that the Acts represent an attempt by the State of Alabama to immunize the defendants' anticompetitive agreements, they have alleged an antitrust injury.

We must still determine whether the Cities are an efficient enforcer of the antirust laws, the second prong of the approach set forth in *Todorov, supra.* This inquiry "involves an analysis of 'other factors in addition to antitrust injury.'" *Todorov*, 921 F.2d at 1450 (quoting *Cargill*, 479 U.S. at 111 n. 6, 107 S.Ct. at 490

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[11] As a preliminary matter, we note that the Cities are persons within the meaning of the Sherman Act. *See City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 395, 98 S.Ct. 1123, 1127, 55 L.Ed.2d 364 (1978).

[12] The Cities also alleged that the defendants conspired with unnamed state officials and members of the Alabama Legislature to enact this illegal agreement.

n. 6). These factors include evaluating whether the injury was direct or indirect. *Id.* at 1451. Although the defendants' allegedly anticompetitive conduct would also injure consumers, such conduct would also directly injure the Cities as competitors. The Cities are therefore an efficient enforcer of the antitrust laws. Because the Cities have alleged an antitrust injury and are an efficient enforcer of the antitrust laws, they have standing to challenge the defendants' anticompetitive conduct regardless of where it occurs in Alabama.

B. *Dismissal of the Cities' Claims*

When reviewing a district court's order dismissing a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), this Court will presume the allegations of the complaint to be true and liberally construe the complaint in the plaintiff's favor. *Burch v. Apalachee Community Mental Health Servs., Inc.,* 840 F.2d 797, 798 (11th Cir.1988) (en banc), *aff'd sub nom., Zinermon v. Burch,* 494 U.S. 113, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990). A motion to dismiss will be denied " 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.* (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-102, 2 L.Ed.2d 80 (1957)).

"[N]otice pleading is all that is required for a valid antitrust complaint." *Quality Foods de Centro America, S.A. v. Latin Am. Agribusiness Dev. Corp.,* 711 F.2d 989, 995 (11th Cir.1983) (citation omitted). A plaintiff must plead sufficient facts so that each element of the alleged antitrust violation can be identified. Conclusory allegations "will not survive a motion to dismiss if not supported by facts constituting a legitimate claim for relief. . . . However, the alleged facts need not be spelled out with exactitude, nor must recovery appear imminent." *Id.* (citations omitted).

### 1. *Dismissal Under the State Action Doctrine*

The district court found that the defendants enjoyed state action immunity for their actions taken pursuant to the Acts and therefore dismissed the Cities' claims relating to these actions. The Cities contend that the defendants' actions do not qualify for state action immunity for two reasons. First, they argue that they have alleged an illegal conspiracy between public officials and the defendants thereby triggering the "public co-conspirator" exception to the state action doctrine. Second, the Cities claim that the Acts are facially invalid because neither the general provisions of the Acts [13] nor the private agreements incorporated in the Acts [14] comply with either prong of the test for state action immunity set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). The Cities therefore argue that the defendants are not entitled to state action immunity for actions taken pursuant to the Acts.

While this case was pending on appeal, the Supreme Court issued its opinion in *City of Columbia v. Omni Outdoor Advertising, Inc.*, —— U.S. ——, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), holding that there was no public co-conspirator exception to the state action doctrine. Accordingly, this component of the Cities' argument is now foreclosed. We therefore address only the Cities' argument that the Acts do not satisfy the *Midcal* test for state action immunity.

In *Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943), the Supreme Court held that Congress did not intend the Sherman Act to prevent

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[13] The general provisions of the Acts are those sections which set forth the rules governing the division of the Alabama retail market into service territories. *See* Ala.Code §§ 37-14-3, 37-14-4, 37-14-32, 37-14-33 (Supp.1989) (collectively "the general provisions").

[14] *See* Ala.Code §§ 37-14-8 & 37-14-36 (Supp. 1989).

action by the states to restrain competition. At the same time, a state may " 'not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' " *Omni,* —— U.S. at ——, 111 S.Ct. at 1353 (quoting *Parker,* 317 U.S. at 351, 63 S.Ct. at 314). A state statute limiting competition will not run afoul of the Sherman Act provided that: (1) the challenged state statute was implemented pursuant to a clearly articulated state policy restraining competition; and (2) the policy was actively supervised by the state. *Midcal,* 445 U.S. at 105, 100 S.C.t at 943. The supervision prong prevents a state from frustrating the national policy in favor of competition by casting a shadow of state involvement over what is essentially private anticompetitive conduct. *Id.* at 106, 100 S.Ct. at 943. Private parties charged with violating the Sherman Act, such as the defendants in this case, may assert immunity under the state action doctrine provided their actions were taken pursuant to state legislation meeting the requirements of the *Midcal* test. *Southern Motor Carriers Rate Conference v. United States,* 471 U.S. 48, 61, 105 S.Ct. 1721, 1728, 85 L.Ed.2d 36 (1985). Accordingly, to decide whether the defendants qualify for state action immunity, we must determine whether the Acts satisfy both prongs of the *Midcal* test.

a. Clearly Articulated State Policy

The Cities concede that the Acts set forth a state policy to restrain competition in retail electric service in order to prevent duplication of electric facilities. *See* Ala.Code. §§ 37-14-1 & 37-14-30. The Cities argue, however, that the stated policy is a sham because the Acts permit some line duplication in the competition for industrial customers.[15]

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[15] The Acts permit electric suppliers, except for the Cities, to compete for industrial customers whose electric loads exceed 2500 kilowatts, even if these customers are located in the service area

The Supreme Court has held that so "long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied." *Southern Motor Carriers*, 471 U.S. at 64, 105 S.Ct. at 1730. The state policy authorizing the anticompetitive conduct does not have to be expressly articlated, however, if the statute provides for "a regulatory scheme that inherently 'displace[s] unfettered business freedom.'" *Executive Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1529 (11th Cir. 1986) (quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978)).

The Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market except for large industrial customers. *See Ala. Code* §§ 37-14-1 & 37-14-30 (reducing the costs of line duplication is the policy supporting this regulation). The sections of the Acts which incorporate the private agreements state that the Legislature has determined that these agreements are consistent with the general purpose of the Acts to avoid line duplication. Ala.Code §§ 37-14-8, 37-14-36 (Supp.1989). Moreover, as we discuss below in section IIB(1)(b), the Acts provide for a regulatory scheme that clearly displaces competition. Finally, the Supreme Court has never stated that the regulations adopted to displace competition must be perfectly consistent with the articulated policy reasons supporting those regulations. Our inquiry under the first prong of the *Midcal* test is merely whether there is a clearly articulated state policy to displace competition, not whether the adopted regulations are the best means to accomplish that policy. Accordingly, we find the Acts satisfy the first prong of the *Midcal* test.

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**assigned to another supplier. Ala.Code §§ 37-14-3 & 37-14-32 (Supp. 1989).**

b. Active State Supervision

The second prong of the *Midcal* test requires that the state actively supervise any private anticompetitive conduct taken pursuant to the regulatory scheme. *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943. The district court found that the Acts strictly controlled the assignment of service areas to electric providers and left no room for private discretion in the assignment of service areas. The court concluded that Alabama had actively supervised all private behavior taken pursuant to the Acts.[16]

The Cities contend that the general provisions of the Acts fail to meet the supervision prong of *Midcal* because they do not provide for a state agency to supervise private behavior under the Acts or for a method for resolving potential disputes over such issues as which electric supplier serves customers at territorial boundary lines. *See* Ala.Code §§ 37-14-3, 37-14-4, 37-14-32, 37-14-33 (Supp. 1989). They also state that the Alabama Legislature failed to provide for any state supervision of the private agreements incorporated into the Acts and argue that this omission causes the private agreements to violate the supervision prong of *Midcal*. *See Ala.Code* §§ 37-14-8, 37-14-36 (Supp. 1989). We will address these concerns in order.

The purpose of the supervision prong is to ensure that private anticompetitive conduct promotes state policy rather than the interests of private parties. *Patrick v. Burget*, 486 U.S. 94, 101, 108 S.Ct. 1658, 1663, 100 L.Ed.2d 83 (1988). In determining whether state legislation satisfies the supervision prong, the Supreme Court has focused its inquiry upon whether private parties or public authorities made the operative decisions regarding the challenged

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[16] The court did note that the Acts give primary suppliers in every municipality the discretion to purchase the distribution facilities of any secondary suppliers within the municipality. The terms and conditions of such purchases are strictly regulated. *See Ala. Code* § 37-14-4.

anticompetitive conduct. The Court has consistently held that state statutes which grant private actors " 'a degree of private regulatory power' " violate the Sherman Act and do not qualify for state action immunity. *Fisher v. City of Berkeley*, 475 U.S. 260, 268, 106 S.Ct. 1045, 1050, 89 L.Ed.2d 206 (1986) (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 665, 102 S.Ct. 3294, 3302, 73, 1042 L.Ed.2d (1982) (Stevens, J., concurring)); *see also Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663 (holding hospital peer-review committees failed to meet the requirements of the supervision prong because private parties exercising decision-making authority were not subject to state supervision); *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943 (holding that statute that authorized price setting by private parties and then enforced those prices failed the supervision prong).[17]

With regard to the general provision of the Acts, the Alabama Legislature has control over all of the decisions being challenged by the Cities in this litigation, *e.g.*, to divide service territories inside and outside municipal limits and to limit competition for large industrial customers of electricity. The general provisions of the Acts have placed no decision-making authority over restraints on competition in the hands of private parties. The general

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[17] We note that "it would be unacceptable ever to impose statutory liability on a party who had done nothing more than obey a state command." *Cantor v. Detroit Edison Co*, 428 U.S. 579, 592, 96 S.Ct. 3110, 3118, 49 L.Ed.2d 1141 (1976). Where the challenged state regulation "involved a mixture of public and private decision-making . . . [despite] state participation in the decision, the private party exercised sufficient freedom of choice to enable the Court to conclude that he should be held responsible for the consequences of his decision." *Id.* at 593, 96 S.Ct. at 3119. Therefore, when the challenged state statute restraining competition delegates regulatory authority to private parties, the private parties may be held liable for their actions that violate federal antitrust laws. *Fisher*, 475 U.S. at 268, 106 S.Ct. at 1050; *see also Patrick*, 486 U.S. at 101, 108 S.Ct. at 1663; *Midcal*, 445 U.S. at 105, 100 S.Ct. at 943; *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

provisions of the Acts set forth the precise procedures that suppliers must follow to divide service areas outside municipal limits. Ala.Code §§ 37-14-3 & 37-14-32 (Supp. 1989).[18] The Acts also grant state courts jurisdiction to resolve disputes over alleged violations of the Acts. Ala. Code §§ 37-14-9 & 37-14-37 (Supp.1989). An electric supplier may initiate an action to enjoin another supplier from violating the provisions of the Acts, *e.g.*, invading the service area of another supplier, and to obtain damages. *Id.*

The general provisions of the Acts eliminate virtually all discretionary behavior by retail electric suppliers outside their service territories and therefore attempt to ensure that all actions taken by the suppliers pursuant to the Acts will serve the policy goals of the Acts.[19] The general provisions of the Acts simultaneously reflect the Alabama Legislature's decision to limit competition in Alabama's retail electric market by dividing the state into service territories, and its determination as to means by which such division shall be accomplished. *See* Ala.Code §§ 37-14-3, 37-14-4, 37-14-32 & 37-14-33 (Supp.1989). Unlike the defendants in *Patrick, supra*, or *Midcal, supra*, the defendants in this litigation do not exercise any private regulatory power. Accordingly, the general provisions of the

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[18] For example, the Acts provide the procedure for determining which supplier will provide service to a customer whose premises are located in two service areas. *See* Ala.Code §§ 37-14-3(1) & 37-14-32(1) (Supp.1989) ("Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premises falls shall provide the service.").

[19] The principal discretion left to electric suppliers by the general provisions is the decision by a primary supplier within existing city limits to purchase the facilities of other suppliers within those city limits on terms specified in the Acts. Ala.Code §§ 37-14-3, 37-14-32 (Supp. 1989). Of course, electric suppliers retain their discretionary authority over the normal operating decisions necessary to service customers within their territories.

Acts fulfill both prongs of the *Midcal* test and are exempt from the Sherman Act.

This conclusion is supported by the decision in *Fisher v. City of Berkeley, supra.* In *Fisher*, the plaintiffs challenged a city ordinance imposing rent ceilings on residential real property as constituting price fixing in violation of the Sherman Act. The Supreme Court held that, because the rent ceilings were imposed by the city and not by private parties, the restraint was not concerted action within the meaning of the Sherman Act. *Fisher*, 475 U.S. at 268-69, 106 S.Ct. at 1050-51. Of course, the general provisions of the Acts challenged in this litigation divide market territories instead of imposing price ceilings. Like *Fisher*, however, government officials, not private actors, made the operative decisions codified in the general provisions of the Acts. *See also 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6, 107 S.Ct. 720, 725 n. 6, 93 L.Ed.2d 667 (1987); *Morgan v Division of Liquor Control*, 664 F.2d 353, 356 (2nd Cir.1981) (holding state statute regulating liquor prices by imposing a minimum markup left little or no discretion to private parties and therefore satisfied the supervision prong of *Midcal*).

The Cities also argue that by passing the Acts the Alabama Legislature merely "ratified" a private anticompetitive agreement among the defendants. They argue that *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), stands for the proposition that the state action doctrine does not permit a state to immunize unlawful private anticompetitive conduct by passing a law declaring it legal, and they contend that this principle was bolstered by the Supreme Court's recent decision in *Omni, supra.*

The Cities are correct that the Supreme Court has long recognized that the state action doctrine does not permit a state to frustrate the national policy in favor of competition by casting a shadow of state involvement over what is essentially private anticompetitive conduct. *Midcal*, 445

U.S. at 106, 100 S.Ct. at 943. The Court developed the two-prong *Midcal* test precisely for this reason—to ensure that state legislation that restrained competition actually furthered state goals and not merely private interests. *Id.* As discussed above, the general provisions of the Acts meet the *Midcal* test. Accordingly, with regard to the general provisions of the Acts, the Cities' ratification argument fails.

We now turn our attention to the private agreements dividing service territories in order to determine whether they meet the supervision prong of the *Midcal* test. Although the private agreements are listed in the Acts, *see Ala.Code* §§ 37-14-8, 37-14-36 (Supp.1989), the terms of these agreements are contained neither in the Alabama Code nor in the record of this case. In finding that the Acts controlled all discretionary behavior by private parties, the district court discussed only the general provisions of the Acts, not the terms of the private agreements.[20] The Supreme Court recently reiterated the principle that states may not immunize private anti-competitive conduct merely by authorizing it. *Omni,* —— U.S. at ——, 111 S.Ct. at 1353. It is to protect against just such a situation that the Court imposed the active supervision prong of the *Midcal* test. *Midcal,* 445 U.S. at 106, 100 S.Ct. at 943. Because the terms of the private agreements are not in the record of this case or in the Alabama Code, we are unable to determine whether they comply with the active state supervision prong of the *Midcal* test. We therefore cannot determine whether the private agreements qualify for state action immunity. Accordingly, we remand this question to the district court for findings consistent with our discussion of the requirements of the active state supervision prong of the *Midcal* test. In remanding this question, we make no comment

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[20] The district court discussed the section of the 1984 Act governing private agreements, but only in reference to the mechanism for private parties to petition the Alabama Legislature to approve additional private agreements regarding service territories.

as to its proper resolution. We note, however, that if the district court should determine that the private agreements comply with the *Midcal* test then dismissal is proper.

2. *Dismissal Under Noerr-Pennington*

The district court dismissed with prejudice those claims by the Cities based on the defendants' allegedly anticompetitive conduct prior to the passage of the Acts. The court reasoned that the defendants' actions were immune from antitrust liability under the *Noerr-Pennington* doctrine because the Cities failed to allege any facts to suggest that the defendants' actions consisted of anything besides petitioning the Alabama Legislature to pass the Acts.

The Cities argue, as they did in their challenge to the defendants' claim for state action immunity, that they have alleged sufficient facts to trigger a "ratification exception" and a "public co-conspirator" exception to the *Noerr-Pennington* doctrine. The Cities accordingly claim that the district court erred in dismissing their claims. As noted above, the Supreme Court has recently held that there is no "public co-conspirator" exception to the *Noerr Pennington* doctrine. *Omni, supra.* Accordingly, the Cities claim under this theory is now foreclosed. We therefore address only the Cities' claim to a ratification exception to the *Noerr-Pennington* doctrine.

Joint efforts among competitors to restrain or monopolize trade by petitioning government officials are immune from antitrust liability under the *Noerr-Pennington* doctrine. *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499, 108 S.Ct. 1931, 1936, 100 L.Ed.2d 497 (1988) (citing *Eastern RR President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657, 669-672, 85 S.Ct. 1585, 1592-1595, 14 L.Ed.2d 626 (1965)). The

boundaries of this protection are determined by "the source, context, and nature of the anticompetitive restraint at issue." *Id.* When a restraint on trade " 'is the result of valid governmental action, as opposed to private action,' those urging the governmental action enjoy absolute immunity from antitrust liability for the anticompetitive restraint." *Id.* (quoting *Noerr,* 365 U.S. at 136, 81 S.Ct. at 529).

This Court has not recognized a ratification exception to the *Noerr-Pennington* doctrine. Moreover, such an exception would likely swallow the rule. It would permit the losers of legislative battles to claim that any coordination by their successful opponents amounted to a prior agreement which was then "ratified" by the legislature. If the *Noerr-Pennington* doctrine is to have any effect, plaintiffs cannot be allowed to use the mere existence of state legislation restraining trade to bootstrap an antitrust claim against the supporters of that legislation.[21]

## III. CONCLUSION

We AFFIRM the district court's finding that the general provisions of the Acts qualify for state action immunity under the two-prong *Midcal* test. We cannot, however, make the same determination regarding the private agreements incorporated into the Acts because the terms of these agreements are contained neither in the

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[21] The Supreme Court's holding in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988), does not support the Cities' claim of a ratification exception to the *Noerr-Pennington* doctrine. In *Allied Tube,* the conduct at issue was an attempt to influence a private standard setting organization to draft codes, which were frequently adopted by state governments, that would exclude the plaintiff. This action did not qualify for protection under *Noerr-Pennington* because the defendants were not attempting to influence the government. *Allied Tube,* 486 U.S. at 504, 108 S.Ct. at 1939. In the instant case, the Cities challenge the defendants' conduct in directly petitioning the Alabama Legislature.

record of this case nor in the Alabama Code. We are therefore unable to decide whether the private agreements satisfy the active supervision prong of the *Midcal* test. Accordingly, we REVERSE and REMAND

**APPENDIX E**

[Filed Jan. 9, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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Civil Action No. 89-H-519-N

MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE; *et al.*,
*Plaintiffs*

vs.

ALABAMA POWER COMPANY; *et al.*,
*Defendants*

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## MEMORANDUM OPINION

## I. PROCEDURAL HISTORY

This cause comes before the Court on defendants Alabama Power Company (APCo), Black Warrior Electric Membership Corporation (Black Warrior), Alabama Rural Electric Association of Cooperatives (AREA), Dixie Electric Cooperative, Covington Electric Cooperative, Inc., Marshall-Dekalb Electric Cooperative, Southern Pine Electric Cooperative, Pioneer Electric Cooperative, Inc., Tombigbee Electric Cooperative, Inc., Wiregrass Electric Cooperative, Inc., Joe Wheeler Electric Membership Corporation, Clarke-Washington Electric Membership Corporation, Tallapoosa River Electric Cooperative, Pea River Electric Cooperative, Central Alabama Electric Cooperative, Sand Mountain Electric Cooperative, Franklin Electric Cooperative, North Alabama Electric Cooperative, Baldwin County Electric Membership Corporation, South Alabama Electric Cooperative, Inc., and Arab Electric Cooperative, Inc.'s (Cooperatives) motions to dismiss, filed June 12, 1989; defendant Coosa Valley Electric

Cooperative's (Coosa Valley) motion to dismiss, filed June 14, 1989; defendant Alabama Electric Cooperative's (Alabama Electric) motion to dismiss, filed September 6, 1989; and the City of Lincoln's motion to intervene as party plaintiff, filed August 11, 1989.

Defendants Coosa Valley and Wiregrass Electric Cooperative (Wiregrass) filed memoranda in opposition to the City of Lincoln's motion to intervene on August 17 and 28, 1989, respectively. Defendants APCo, AREA and Cooperatives, Wiregrass, and Coosa Valley filed briefs in support of their motions to dismiss on July 21, 1989. Defendant Black Warrior filed a brief on July 25, 1989. Plaintiffs filed a brief in response to the motions to dismiss on August 14, 1989. Defendants APCo, Cooperatives and AREA, and Coosa Valley filed reply briefs on September 1, 1989. The Court heard oral argument on October 19, 1989. Defendant Coosa Valley filed an additional brief on December 18, 1989, to which plaintiffs filed a response on December 20, 1989.

Upon consideration of the motions, the briefs and arguments of counsel, and for the reasons set forth below, the Court is of the opinion that the City of Lincoln's motion to intervene is due to be denied and the defendants' motions to dismiss are due to be granted, and this cause is due to be dismissed, with prejudice.

## II. ANALYSIS: MOTION TO INTERVENE

The City of Lincoln moved to intervene pursuant to Federal Rule of Civil Procedure 24(b), which allows anyone to intervene when the applicant's claim and the main action have a question of law or fact in common. Rule 24(b) provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." As the Court is of the opinion that the proposed intervention would unduly delay the adjudica-

tion of the rights of the original parties, the motion is due to be denied.

## III. ANALYSIS: MOTIONS TO DISMISS

### A. CLAIMS AND DEFENSES

Plaintiffs bring this cause of action under 15 U.S.C. § 15 for injunctive relief and damages [1] for violations of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Clayton Act, 15 U.S.C. § 26. Plaintiffs are municipal and public corporations and boards which own and operate electric distribution facilities in various cities in the State of Alabama. Plaintiffs allege that the defendants, which are rural electric cooperatives organized under the laws of the State of Alabama and a corporation incorporated under the laws of the State of Alabama which provide electric power at wholesale and retail within the State of Alabama, entered into private agreements for the division of markets which later became embodied in the Territorial Acts of 1984 and 1985 ("Territorial Acts"), Ala. Code §§ 37-14-1 through 37-14-40 (1989 Cum. Supp.). Plain-

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[1] Plaintiffs also request declaratory relief (presumably under the auspices of 28 U.S.C. § 2201) and request the Court to declare that the Territorial Acts are invalid and unconstitutional. Various of the defendants have noted in their briefs that the complaint fails to allege any facts which would support a finding of unconstitutionality of the Territorial Acts. Plaintiffs, at page 75 of their response brief, argue that the Territorial Acts are unconstitutional under the Supremacy and Commerce Clauses of the United States Constitution.

Plaintiffs' Supremacy Clause argument presupposes a violation of federal antitrust laws, which the Court addresses regarding the issues of standing and the Noerr-Pennington and state-action doctrines. Therefore, the Court will not separately address said alleged violation concerning plaintiffs' Supremacy Clause argument.

Plaintiffs' Commerce Clause argument also appears to depend on federal antitrust laws, and Congress' enactment of such laws, under the Commerce Clause. However, the complaint fails to allege *any* facts which would support a finding that the Territorial Acts conflict with the Commerce Clause independent of any alleged antitrust violation.

tiffs allege that the defendants acted in concert with the legislature of the State of Alabama to divide the State of Alabama into exclusive retail electric service areas and prevent competition from plaintiffs in those areas. Plaintiffs allege that the defendants acted in concert with the legislature of the State of Alabama to deny plaintiffs the opportunity afforded defendants to serve certain large industrial customers in other electric suppliers' assigned service areas and to assign plaintiffs service areas different from those allocated to defendants under the general provisions of the Acts. Plaintiffs allege that defendants have monopoly power over wholesale and retail electric sales throughout a substantial part of Alabama and neighboring states. Plaintiffs allege that, as a result of defendants' actions, they have lost both actual and potential sales of electricity, actual and potential customers, and have been financially damaged in an indeterminate amount due to loss of opportunities to serve certain large industrial customers.

Defendants move to dismiss for failure to state a claim upon which relief can be granted. Defendants argue that plaintiffs lack standing to assert a cause of action under 15 U.S.C. § 15, that the petitioning for passage of legislation does not give rise to federal antitrust liability under the Noerr-Pennington doctrine, that defendants' actions taken pursuant to the Acts are protected under the state-action doctrine, and that plaintiffs' claims are barred by the statute of limitations.

For the reasons set forth below, the Court finds that the plaintiffs' complaint is due to be dismissed since plaintiffs lack standing to assert an action under 15 U.S.C. § 15 for the alleged division of territories outside of their respective spheres of operation established by the Territorial Acts, Ala. Code § 37-14-4 and for their inability to compete for large industrial customers located outside of those spheres of operation. The Court finds that plaintiffs do have standing to challenge the division of terrtories

within their spheres of operation established by the Territorial Acts, but that plaintiffs' complaint as to this claim is due to be dismissed on the basis that defendants' activities are protected under the Noerr-Pennington and state-action doctrines. The Court does not reach the issue of whether plaintiffs' claims are barred by the statute of limitations as the Court finds that this issue involves facts not present in the pleadings and therefore is inappropriate for resolution at this juncture.

## B. STANDING TO SUE

In the instant case, the issue presented by defendants' assertion of plaintiffs' lack of standing is whether plaintiffs are able to suffer actual or threatened antitrust injury by the establishment of service territories or the limitation of the plaintiffs' ability to compete for large industrial customers outside of their assigned service territories. As the Court understands it, defendants base their standing argument on the premise that plaintiffs' ability to operate municipal electric services is the result of a specific grant of power delegated to plaintiffs by the State of Alabama. *See* Ala. Code § 11-50A-1 *et seq.* (1989 cum. supp.). Since the plaintiffs can only operate electric power boards and corporations by the specific delegation of power by the State, defendants argue that the State can limit the power so delegated and restrict the sphere in which municipal power corporations can operate.[2] If the State has

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[2] Defendants argue that the State of Alabama actually so limited the plaintiffs by enacting Ala. Code § 37-14-3, which states:

> Except as otherwise provided in subdivisions (2), (3), and (4) of this section in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984), no electric supplier shall construct or maintain electric distribution lines for the provision of retail electric service to any premises being provided retail electric service by another electric supplier, or to any new premises located within the boundaries of assigned service areas of another electric supplier, even if the premises is within municipal limits and the electric supplier in whose assigned area the premises is lo-

chosen to so limit plaintiffs' ability to operate, then any division of territories outside of the plaintiffs' delegated sphere of operation does not affect any business interests of the plaintiffs since plaintiffs have no delegated power

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cated has no franchise from the municipality in which such premises is located. Assigned service areas *outside existing municipal limits* are hereby established as set forth in this section.

(1) Except as specified in subdivisions (2) and (3) of this section herein, each electric supplier is hereby assigned the sole obligation, in accordance with its established rules and regulations, in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984 whether or not a franchise has been granted by the municipality to the electric supplier to whom an area annexed has been assigned or to pay other electric supplier), for provision of retail electric service to all new premises located in closer proximity to existing distribution lines of such supplier than the nearest existing distribution lines of any other electric supplier. No other electric supplier shall render electric service to such premises. Thus, the assigned service area of each electric supplier in areas outside existing municipal limits is defined as the area or areas consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premises falls shall provide the service. *The above assignment shall also apply to areas within the existing municipal limits in the event the primary electric supplier fails to exercise the option to purchase set forth in section 37-14-4.*

. . .

(3) Notwithstanding subdivision (2) hereof, no municipality or municipally-owned supplier shall provide retail electric service in any area outside existing municipal limits *unless the premises to be so served is in the assigned service area of such electric supplier.*

. . .

(6) . . . [M]unicipal annexations after April 26, 1984 . . . shall [not] affect any rights or limitations regarding

to compete for electric customers outside of their permitted spheres of operation.

Although this particular issue was not fully briefed by either the defendants or the plaintiffs,[3] the argument is one which falls within the "target area" doctrine which courts have developed to address the issue of antitrust standing.[4] In this circuit, in order to have standing to bring an antitrust action "a plaintiff must have suffered antitrust injury, which is injury of the type the antitrust laws were intended to prevent and which flows from that which makes a defendant's acts unlawful. The injury must reflect the anticompetitive effect of either the violation of antitrust law or of the anticompetitive acts made possible by the violation, and it should be the type of loss which a violation of antitrust law would be likely to cause." *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 710 (11th Cir. 1984) *citing Brunswick Corporation v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). Put in the context of *Midwestern Waffles*, defendants' argument basically states that plaintiffs have not

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retail electric service under this section. Any annexation by a municipality pursuant to the laws of this state shall be subject to and conditioned upon recognition of the provisions of this article.

(Emphasis added.)

[3] Indeed, defendant Coosa Valley is the only defendant which pursued the standing issue at any length during oral argument. It included two paragraphs concerning the issue of standing at pages 9-10 of its initial brief in support of its motion to dismiss, and included an additional paragraph at pages 9-10 in its reply brief. Plaintiffs devoted three paragraphs to the standing issue at pages 93-94 of their brief in opposition to the motions to dismiss. Defendant Coosa Valley submitted an additional brief on the issue on December 18, 1989, but did not add substantially to their earlier arguments.

[4] *See Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1493-1497 (11th Cir. 1985) for a discussion of the various tests and methods developed by federal courts for determining whether a plaintiff has antitrust standing.

suffered an antitrust injury in having their sphere of operations limited by the Territorial Acts, since the antitrust laws do not make it unlawful for a state to retract or limit a delegation of state authority.

During oral argument, counsel for plaintiffs' argued that the State of Alabama can only exercise its sovereign power consistently with federal laws. Plaintiffs argue that if the State has delegated to the plaintiffs the authority to engage in economic activities, then the State cannot limit the plaintiffs' exercise of such authority in such a way so as to violate federal antitrust laws. Plaintiffs cite *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982) and *Town of Orangetown v. Gorsuch*, 544 F. Supp. 105 (S.D.N.Y.) *aff'd* 718 F.2d 29 (2nd Cir. 1983) in support of their argument.

Initially, the Court finds that the cases cited do not support plaintiffs' argument. Although the *Washington* case does stand for the proposition that a state's delegation of state power cannot be exercised in an unconstitutional manner, the State of Washington's action in that case was determined to have violated the Equal Protection Clause in that it delegated state power in a racially discriminatory manner. Similarly, the *Orangetown* case merely states that a city may sue to vindicate its own proprietary interests. *City of Orangetown, supra,* at 108.

In the present case, the State of Alabama is not a defendant, and the complaint fails to set out any allegations regarding how the delegation of state power in question violates any constitutional provision or federal antitrust laws.[5] Furthermore, citing *Orangetown* merely

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[5] Although plaintiffs' complaint alleges that the defendants in this cause have entered into agreements for the division of service territories, which would be a *per se* violation of federal antitrust laws, the question presented by the State of Alabama's restriction of its delegation of power is not whether there has been a division of territories, but whether the State of Alabama has chosen not to exercise its economic power to provide electric services outside

begs the question of whether the plaintiffs here *have* a "proprietary interest" which has been injured *by an antitrust violation.* As it has been previously noted, "Injury implies violation of a legal right." *Keogh v. Chicago & N.W. Ry. Co.,* 260 U.S. 156, 163 (1922). Plaintiffs here have no legal right to operate electric power facilities absent the delegation of the power to do so by the State of Alabama. As such, plaintiffs have failed to allege an antitrust violation based upon the State's failure to grant them the power to compete for new customers outside of certain specified areas. *See Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.,* 214 F.2d 414, 418 (5th Cir. 1954); *United Mine Workers v. Pennington,* 381 U.S. 657, 671 (1965). Since plaintiffs have no authority to compete for customers outside of certain areas, they cannot have been injured by any alleged division of territories outside of those areas. As such, plaintiffs lack standing to assert an antitrust action against defendants stemming from any alleged anticompetetive

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of certain geographic areas. If the State of Alabama chooses to restrict its exercise of state power, and thereby the power delegated to plaintiffs, the Court is aware of nothing in the antitrust laws which prohibits it from so doing.

For example, those cities which did not become incorporated until after April 26, 1984 are effectively precluded by the Territorial Acts from ever forming a municipal electric corporation, Ala. Code § 11-50A-1 *et seq.* notwithstanding. However, there is nothing in the federal antitrust laws which requires the State of Alabama to allow those municipalities to form electric service corporations. As such, the injury which such municipalities may suffer does not stem from a violation of federal antitrust laws, but the decision of the State of Alabama to limit its delegation of power.

Similarly, plaintiffs do not allege that defendants have attempted to create a division of territories as regard large industrial electric customers, since there remains free competition between service areas for these customers. Rather, plaintiffs' complaint states that defendants conspired to exclude plaintiffs from being able to compete for these customers. However, the Court is unaware of any federal antitrust law which requires the State of Alabama to allow municipalities freely to compete for such customers.

acts which concern areas in which plaintiffs have no authority to compete. Accordingly, those claims contained in the complaint for injuries stemming from the division of territories outside of plaintiffs' assigned spheres of operation and from plaintiffs' inability to compete for large industrial electric customers located outside assigned areas are due to be dismissed.

## C. NOERR-PENNINGTON AND STATE ACTION DOCTRINES

Although plaintiffs do not have standing to challenge any anticompetitive acts which take place outside of the areas in which they are authorized to compete, they do have standing to challenge the alleged division of service territories which occur within the areas in which they are authorized to compete. Therefore, the Court must determine whether plaintiffs have sufficiently stated antitrust violations which affect their ability to compete within these areas, or whether defendants may validly assert that their actions are protected under the Noerr-Pennington and state-action doctrines.

### 1. Standard to apply: 12(b)(6) dismissal

In order to disimiss an action under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the complaint must fail to state a claim upon which relief can be granted. At this stage of the litigation, the Court must accept plaintiff's allegations as true. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

### 2. The Noerr-Pennington Doctrine

Defendants assert that any claims which plaintiffs base on the defendants' alleged efforts to influence the Alabama Legislature to pass the Territorial Acts do not

constitute antitrust violations under the Noerr-Pennington doctrine,[6] and therefore fail to state a claim upon which relief can be granted.

Plaintiffs respond that the recent case of *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, —— U.S. ——, 108 S.Ct. 1931 (1988) has significantly narrowed the sweep of the Noerr-Pennington doctrine, and that defendants' activities fall outside of Noerr-Pennington protection as that doctrine was construed in *Allied Tube*. More specifically, plaintiffs argue that they have alleged a conspiracy between defendants and the Alabama Legislature to violate federal antitrust laws, and that such a conspiracy is not protected under the Noerr-Pennington doctrine.

Defendants reply that the plaintiffs' complaint only alleges that the defendants "acted in concert with" the Legislature, and that such a conclusory allegation without any accompanying allegations of supporting fact is insufficient to state a claim under an exception to the Noerr-Pennington doctrine, and therefore such claims properly may be dismissed under Rule 12(b)(6).

Initially, the Court notes that the holding in *Allied Tube* does not support plaintiffs' argument. The defendants in that case were alleged to have tried to influence the National Fire Protection Association's (a private organization) product standard for electrical conduit. In holding that the Noerr-Pennington doctrine did not apply to such efforts, the Supreme Court stated that "where, *independent of any government action*, the anticompeti-

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[6] The "Noerr-Pennington doctrine" derives from the Supreme Court's decisions in *Eastern Railroads Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). In those cases the Supreme Court held that the Sherman Antitrust Act does not apply to attempts to influence public officials or the passage or enforcement of laws, even though the requested official action would produce a restraint on trade or a monopoly. *Noerr*, 365 U.S. at 135; *Pennington*, 381 U.S. at 670.

tive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence governmental action." *Allied Tube,* 108 S.Ct. at 1936. (Emphasis added). The Supreme Court reaffirmed, however, that where restraint of trade is the result of valid governmental action, those urging the government action enjoy absolute immunity from antitrust liability for the anticompetitive restraint. *Id.* As the Court determines that the instant case is no "independent of any government action", it finds the holding of *Allied Tube* inapposite to the facts alleged in the case *sub judice.*

Plaintiffs also argue that the private action complained of in the complaint was not genuinely aimed at procuring favorable government action and therefore was a mere sham that cannot be deemed a valid effort to influence government action. Plaintiffs rely on *California Motor Transport Co. v Trucking Unlimited,* 404 U.S. 508 (1972), and other cases which declare that a conspiracy between public officials and a private entity constitutes an exception to Noerr-Pennington protection. Upon a close reading of the cases cited by plaintiffs, the Court finds that the "sham" or "co-conspirator" exception applies only where the actions of the private entities have effectively blocked a plaintiff's access to the decision-making tribunal and have usurped the public decision-making process. In the legislative arena, such usurpation may be shown by evidence that public officials were bribed or otherwise were improperly coerced into taking the desired action. *See id.,* 404 U.S. at 513. In the present case, plaintiffs fail to allege *any* facts in their complaint that would indicate that the co-conspirator exception to the Noerr-Pennington doctrine would apply to the passage of the Territorial Acts. Plaintiffs merely allege that the defendants "acted in concert with" the Alabama Legislature in passing the Acts. However, the agreement of a legislator to support a cause does not render that legislator a "co-conspirator" for purposes of the Noerr-Pennington

doctrine. *See Metro Cable Co. v. CATV of Rockford, Inc.*, 516 F.2d 220, 230 (7th Cir. 1975). Accordingly, the Court finds that any allegations of a conspiracy contained in the complaint are conclusory at best and therefore that the "sham" or "co-conspirator" exception to the Noerr-Pennington doctrine does not apply. As such, the complaint fails to state an antitrust claim for actions taken by the defendants in petitioning the Alabama legislature for the passage of the Territorial Acts, as federal antitrust law does not prohibit such petitions.

3. The State-action Doctrine

Plaintiffs claim that the actions of the defendants taken pursuant to the Territorial Acts in creating service area lines and purchasing the facilities of secondary service providers within the primary service provider's assigned area violate the Sherman Act and that plaintiffs have been harmed thereby.

Defendants argue that actions taken pursuant to the Territorial Acts do not violate federal antitrust laws since the Sherman Act was not intended to restrain state action or action taken by private parties which is directed by the state. Defendants cite *Parker v. Brown*, 317 U.S. 341 (1943) and *California Retail Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980) in support of their argument.

Plaintiffs recognize that *Parker v. Brown* does establish a state-action exception to the Sherman Act, but counter that such exception does not apply in this case for two reasons. First, plaintiffs argue that they have alleged a conspiracy between public officials and the defendants which takes the actions complained of outside of the state-action exception. Second, plaintiffs contend that the Territorial Acts are invalid under the two-prong *Midcal Aluminum* test because the Acts fail to fulfill either prong of the test.

Defendants reply that the conspiracy alleged in the complaint consists of conclusory statements and that the complaint fails to allege any facts which would tend to establish a conspiracy. Defendants also contend that the Territorial Acts satisfy both prongs of the *Midcal Aluminum* test. Therefore, defendants argue, the complaint fails to state a claim upon which relief can be granted since the actions complained of fall outside of the actions prohibited by the Sherman Act.

3a. Public Co-Conspirator Exception

Plaintiffs' state-action co-conspirator argument differs somewhat from their Noerr-Pennington co-conspirator argument in that plaintiffs allege that the Alabama Legislature merely ratified, or "rubber stamped" pre-existing private territorial agreements and that such public ratification of private anticompetitive agreements cannot make such agreements lawful under the state-action doctrine.

The Court takes as true plaintiffs' allegations that defendants entered into private unlawful territorial agreements prior to the passage of the Territorial Acts, and that the Alabama Legislature incorporated such agreements into the Acts. Taking these allegations as true, the question with which the Court is presented is whether the Alabama Legislature can incorporate private agreements into a comprehensive regulatory scheme and not run afoul of federal antitrust laws. Although plaintiffs argue that such incorporation automatically renders the Territorial Acts a product of "private action" rather than "state action", the Court finds nothing in the cases cited by plaintiffs which indicate that a state cannot adopt an otherwise unlawful and pre-existing scheme *if* the state does so with the intention to displace competition with regulation and *if* the state actively supervises the anticompetitive conduct so that private actors lose the discretion to modify the scheme to suit their private needs. As such, the Court finds that the "public co-conspirator" argument set forth by plaintiffs does not differ analytically

from the determination of whether the Territorial Acts constitute valid state action under the *Midcal Aluminum* test, allegations of conspiracies notwithstanding.[7]

3b. The *Midcal Aluminum* Test

Although the state-action doctrine was originally set forth in *Parker v. Brown, supra,* the Supreme Court recently has established a two-part test to determine whether a particular action falls within such doctrine. In *Midcal Aluminum,* 445 U.S. at 105, the Supreme Court stated that the challenged restraint on competition must be first, one clearly articulated and affirmatively expressed as state policy, and second, must be actively supervised by the state itself.

The first prong of the test avoids situations such as those presented in *Northern Securities Co. v. United States,* 193 U.S. 197 (1904) and *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976). In *Northern Securities* an antitrust defendant attempted to shield its acquisition of a competitor by arguing that the acquisiton was lawful under the state's corporate laws. The Supreme Court rejected the defendant's argument and found that the creation of general corporate laws could not displace federal antitrust laws and that the defendant could not accomplish an unlawful end through otherwise lawful means. 193 U.S. at 346. In *Cantor* the defendant attempted to shield its practice of providing light bulbs to its customers free of charge and then adding the cost of the bulbs to its utility rates by arguing that the rates were approved by the public service commission and could not be changed until a new tariff was approved by the commission. In finding that defendant's actions were not shielded from antitrust laws, the Supreme Court

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[7] To the extent that plaintiffs attempt to rely on their allegation that the Alabama Legislature "acted in concert with" the defendants, the Court finds such allegations to be conclusory and to add nothing to their argument. *See* discussion at 12-13 *infra.*

noted that the anticompetitive conduct complained of, that is the sale of light bulbs, was not required by the state laws governing the operation of public utilities and that the decision to market light bulbs in the manner challenged was not the result of state action but was the result of private action. 428 U.S. at 593.

In the case at bar, the Court finds from the overall structure of the Territorial Acts that it was the clear intention of the State of Alabama to displace competition for the provision of electric power services to all electric power users other than large industrial users with a system of regulation. The Territorial Acts are not general legislation but specifically establish a system whereby electric service territories are assigned and provide procedures for the transition to a service territory scheme. The Territorial Acts can have no other purpose but to displace competition with the system established by the State. As such, the Court finds that the challenged activity satisfies the first prong of the *Midcal Aluminum* test.

The second prong of the test requires that the state actively supervise the anticompetitive action subject to challenge. This prong of the test appears to be designed to keep states from setting the foxes to watching the hen house. The pricing scheme challenged in *Midcal Aluminum* failed this prong of the test in that the State of California did not establish the price schedules, did not review the reasonableness of the schedules, nor did it regulate the terms of fair trade contracts entered into pursuant to the regulatory scheme. As such, the Supreme Court found that the retail price maintenance scheme did not constitute valid state action but merely amounted to an attempt to render legal an otherwise unlawful private price-fixing arrangement. *See Midcal Aluminum,* 445 U.S. at 105-106.

In the case at bar, the Court can find no part of the determination of territorial lines which has been left to

private discretion. The only area in which the Territorial Acts allows private discretion is in the decision of a primary supplier to purchase or not to purchase the electric service facilities of a secondary service provider operating in the primary provider's assigned service area. Even as to this otherwise discretionary decision, the manner in which the discretion may be exercised is regulated by statute. *See* Ala. Code § 37-14-4. Otherwise, the manner in which service areas are established is mandated by statute and leaves no room for private action. Private parties may petition the Alabama Legislature if they wish to depart from the service areas so assigned, but agreements by private parties must be presented to the Legislature and approved by it before a party can implement such agreement. Ala. Code § 37-14-8. Although there is no explicit statutory mechanism for a continuing assessment as to whether the service territories established under the Territorial Acts continue to serve the public interest, the Court finds that the ability of private parties to petition for amendments to the Territorial Acts provides a continuing avenue of review of the service territories established under the Acts. As such, the Court finds that the anticompetitive actions alleged in the complaint are completely regulated by the Territorial Acts and that the Acts do not leave any room for private anticompetitive action and are "actively supervised" by the State of Alabama. Accordingly, the Court finds that the statutory scheme satisfies the second prong of the *Midcal Aluminum* test and therefore the actions complained of are valid state actions not subject to the Sherman Act.

## D. CONCLUSION

Pursuant to the foregoing analysis, the Court concludes that the defendants' motions to dismiss are due to be granted in that the plaintiffs lack standing to assert antitrust claims for the division of territories outside of the sphere of operation allowed to them by the State of Alabama. Furthermore, plaintiffs' claims as to alleged

antitrust violations occurring within those spheres of operation are also due to be dismissed for failure to state a claim upon which relief can be granted since defendants' efforts to influence the passage of the Territorial Acts are protected under the Noerr-Pennington doctrine, and the defendants' actions taken pursuant to the Territorial Acts fall within the protection of the state-action doctrine.

Although the Court expresses no opinion as to whether the Territorial Acts represent wise state policy, it appears that the plaintiffs and defendants here fought a battle in the Alabama State Legislature, and that the plaintiffs lost in that arena. This law suit appears to be an effort to continue the same battle in the judicial arena. However, the Noerr-Pennington and state-action doctrines dictate that such battles remain in the legislative arena, and that decisions regarding state economic policy are for state legislatures rather than federal courts. This Court's holding says no more than that this Court will abide by the wisdom of such doctrines.

A separate order will be entered in accordance with this memorandum opinion.

DONE this 9th day of January, 1990.

/s/ Truman Hobbs
United States District Judge

[Filed Jan. 9, 1990]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

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Civil Action No. 89-H-519-N

MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE; *et al.*,
*Plaintiffs*

vs.

ALABAMA POWER COMPANY; *et al.*,
*Defendants*

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ORDER

In accordance with the attached Memorandum Opinion, the motion to intervene filed on behalf of the City of Lincoln is DENIED and defendants' motions to dismiss are GRANTED. Accordingly, this cause is DISMISSED, with prejudice.

DONE and ORDERED this 9th day of January, 1990.

/s/ Truman Hobbs
United States District Judge

## APPENDIX F

**The Sherman Act**, 15 U.S.C. §§ 1 and 2 (Supp. II 1990):

### § 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

### § 2. Monopolization; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

## APPENDIX G

**The Clayton Act,** 15 U.S.C. § 26 (1988):

### § 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of subtitle IV of title 49, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. In any action under this action in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

## APPENDIX H

## STATUTORY PROVISIONS INVOLVED

## CHAPTER 14

## SERVICE TERRITORIES FOR ELECTRIC SUPPLIERS

## ARTICLE 1

## 1984 ACT

### § 37-14.1. Legislative declarations, findings, etc.

The Legislature of the State of Alabama has investigated the economic, financial and environmental impact associated with the potential for duplication of electric distribution facilities used for the furnishing of retail electric service. Among its findings are the conclusion that with respect to retail electric sales, the benefit normally associated with competition between two or more entities for customers is outweighed by the tremendous cost burden which must be borne by such customers associated with the maintenance of two or more duplicate sets of facilities. It is the further finding of the legislature that the existence of duplicate facilities for the furnishing of electricity at retail is not in the public interest because of the adverse impact which such duplication has on environmental and aesthetic values and on safety. It is therefore declared that the policy of the State of Alabama is to ensure effective, economical and orderly supply of electric service at retail to customers in the state and to avoid unnecessary duplication of facilities by electric suppliers for the furnishing of such services which would result in waste and in degradation of the environment. To accomplish these objectives, it is necessary and in the public interest to establish, mandate and implement procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the state including areas within present and

future corporate limits of municipalities in the state. (Acts 1984, No. 84-206, p. 314, § 1.)

**§ 37-14-2. Definitions.**

As used in this article, the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise;

(1) ELECTRIC SUPPLIER. Any municipality, municipally-owned utility or other governmental entity, any cooperative, corporation, person, firm, association or other entity engaged in the business of supplying electric service at retail; provided, however, that a university, college or United States military base which distributes electricity shall not be deemed an electric supplier for the purpose of this article.

(2) ELECTRIC SERVICE AT RETAIL and RETAIL ELECTRIC SERVICE. Electric service furnished to a customer for ultimate consumption, but does not include wholesale electric service furnished by an electric supplier to another electric supplier for resale.

(3) PREMISES. The building, structure or facility to which electricity is being metered or is to be furnished and metered, including all meters on such building, structure or facility through which electricity is delivered or to be delivered. Such term shall also include any building, structure or facility which is reconstructed to replace a previously existing building, structure or facility of substantially the same size. In the event two or more buildings, structures, or facilities are located on one tract of land utilized by one customer, those buildings, structures, or facilities which are or will be served through a different meter shall be considered a separate premises.

(4) DISTRIBUTION LINE. An electric conductor which is operated at 35,000 volts or less, up to but not including the service drop. The service drop shall be that line from the last pole or last transformer on the distribution system to the premises.

(5) EXISTING DISTRIBUTION LINE. A distribution line in existence on January 1, 1984.

(6) PRIMARY ELECTRIC SUPPLIER. That electric supplier for each municipality existing on January 1, 1984 serving a plurality of the premises within the existing municipal limits to which service is actually being supplied and metered on January 1, 1984.

(7) SECONDARY ELECTRIC SUPPLIER. Any electric supplier within existing municipal limits which is not the primary electric supplier.

(8) EXISTING MUNICIPAL LIMITS. The corporate boundaries of any municipality as such boundaries existed on April 26, 1984.

(9) REPRODUCTION COST NEW LESS DEPRECIATION. The total investment that would be required by the electric supplier selling the facilities to duplicate the facilities to be sold at the time of such sale utilizing then current costs for all materials, supplies, labor, land and land rights, transportation, and miscellaneous direct and indirect expenses (including overhead, engineering and supervision costs that are normally capitalized) that would be required; the costs that would be required to obtain all necessary approvals and permits; and any other costs that would be appropriately applicable to the reproduction of the facilities, less an amount representing the straight line depreciation of such reproduction costs of any depreciable items over an assumed life of 30 years for electric distribution facilities for that period of time equal to the age of the items of the electric distribution facilities being transferred.

In no event, however, shall any item be depreciated more than 30 percent of the reproduction costs new of that item, so that in no event shall reproduction cost new less depreciation be less than 70 percent of the reproduction cost of such item.

(10) INDUSTRIAL CUSTOMER. A customer utilizing electric service at a premises at which the predominate activity is classified as mining, manufacturing, transportation, communication, electric, gas and sanitary services, or miscellaneous repair services in the Standard Industrial Classification Manual, Part I, Divisions B, D and E and Major Group 76 of Division I as published in 1972 by the Statistical Policy Division of the United States Office of Management and Budget. (Acts 1984, No. 84-206, p. 314, § 2.)

**§ 37-14-3. Electric service outside existing municipal limits.**

Except as otherwise provided in subdivisions (2), (3), and (4) of this section in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984), no electric supplier shall construct or maintain electric distribution lines for the provision of retail electric service to any premises being provided retail electric service by another electric supplier, or to any new premises located within the boundaries of assigned service areas of another electric supplier, even if the premises is within municipal limits and the electric supplier in whose assigned area the premises is located has no franchise from the municipality in which such premises is located. Assigned service areas outside existing municipal limits are hereby established as set forth in this section.

(1) Except as specified in subdivisions (2) and (3) of this section herein, each electric supplier is hereby assigned the sole obligation, in accordance

with its established rules and regulations, in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984 whether or not a franchise has been granted by the municipality to the electric supplier to whom an area annexed has been assigned or to any other electric supplier), for provision of retail electric service to all new premises located in closer proximity to existing distribution lines of such supplier than the nearest existing distribution lines of any other electric supplier. No other electric supplier shall render electric service to such premises. Thus, the assigned service area of each electric supplier in areas of outside existing municipal limits is defined as the area or areas consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premmises falls shall provide the service. The above assignment shall also apply to areas within the existing municipal limits in the event the primary electric supplier fails to exercise the option to purchase set forth in Section 37-14-4.

(2) Notwithstanding the above limitations stated in this section on construction of facilities to serve customers in areas outside existing municipal limits, an electric supplier may construct, operate and maintain facilities for provision of retail electric service to any new industrial customer not presently or previously served by another electric supplier, in an area outside existing municipal limits where the initial electric service requirement to such industrial customer, under normal operations and with a six-month growth period permitted from date of initial service, is equal to or greater than 2500 kilowatts

as measured over a 15-minute integrated period, upon written request to such electric supplier by the industrial customer to be served.

(3) Notwithstanding subdivision (2) hereof, no municipality or municipally-owned electric supplier shall provide retail electric service in any area outside existing municipal limits unless the premises to be so served is in the assigned service area of such electric supplier.

(4) The foregoing limitations shall not prevent an electric supplier from constructing electric facilities to serve its own premises used or to be used in its electric operations and other premises owned and occupied solely and exclusively by the electric supplier, or a municipality which appoints the governing body of such electric supplier or any agency of said municipality whose governing body is appointed by that municipality.

(5) Within nine months after April 26, 1984, all electric suppliers having existing distribution lines in each county in the state shall exchange maps of such facilities (as of January 1, 1984) located within the county. These maps shall be sufficiently detailed to permit the development of a definitive understanding of the electric supplier designated to serve under the guidelines set forth in subdivision (1) above. The legislature recognizes that the vast majority of existing distribution lines within existing municipal limits will have no effect on the assigned service areas determined in accordance with this section and electric suppliers may, at their option, elect not to show existing distribution lines which do not affect the assigned service areas.

(6) Neither (i) municipal annexations after April 26, 1984, nor (ii) the construction or removal of any facilities after January 1, 1984, nor (iii) the

purchase or sale of any facilities after April 26, 1984 consummated under the provisions of this article shall affect any rights or limitations regarding retail electric service under this section. Any annexation by a municipality pursuant to the laws of this state shall be subject to and conditioned upon recognition of the provisions of this article. (Acts 1984, No. 84-206, p. 314, § 3.)

**§ 37-14-4. Primary supplier's option to acquire facilities within existing municipal limts.**

The primary electric supplier within each municipality shall, at its option have the right to acquire all distribution facilities of any secondary electric supplier used to supply retail electric service within the existing municipal limits and shall have the right to serve all premises within the existing municipal limits of such municipality subject to the following;

(1) The primary electric supplier must announce its intention to exercise its option in writing by registered or certified mail to the affected secondary suppliers within each municipality, addressed to the chief executive officer or manager of such secondary supplier, no later than nine months after April 26, 1984. Simultaneously with the delivery of the notice of exercise of its option by the primary electric supplier, the primary electric supplier shall deposit in escrow with a bank whose principal office is in Alabama and which has capital and surplus of not less than $5,000,000.00, or with any other escrow agent agreeable to the parties, the amount of $1,000.00 for each premises receiving electricity from the distribution facilities proposed to be purchased by the primary electric supplier on the date of the notice based on the primary electric supplier's good faith estimate of the number of premises involved. The secondary supplier shall, within seven

days after receipt of such notice, provide the actual number of premises involved, if different from that estimated by the primary supplier, and the escrow deposit made by the primary supplier shall be adjusted to accommodate any difference within seven days after such actual number of premises is supplied. The escrow agent shall be directed and authorized to invest the funds placed in escrow by the primary electric supplier in any investment directed by the primary electric supplier. The escrow agent is further authorized, upon election of the primary electric supplier making the deposit, to combine for investment any other deposit made by that depositor for the same purpose with respect to different facilities. The escrow agent shall render periodic accountings as to the escrow account to the primary electric supplier and the secondary electric supplier. If the purchase is consummated in accordance with this article, the funds shall be used to satisfy the purchase price of the facilities and other consideration to be paid by the primary electric supplier to the secondary electric supplier due as of the date of closing as determined under this section. Any portion of such fund in excess of the amount due to be paid to the secondary electric supplier on the date of closing shall be refunded to the primary electric supplier. If the amount due to be paid by the primary electric supplier to the secondary electric supplier under this section on the date of closing is in excess of the amount in the escrow account, the primary electric supplier shall pay the difference to the secondary electric supplier at closing. If the closing of the facilities is not consummated because of the failure of the primary electric supplier is to pursue its option under this article to purchase the distribution facilities, the escrow agent shall be instructed to deliver from the escrow fund to the secondary electric supplier, 14 days after the date

on which the primary electric supplier's rights to purchase the facilities expire unconsummated, the interest earned on the amount deposited from investment of such funds plus 10 percent of the amount originally deposited by the primary electric supplier. The balance of such escrow funds shall be returned to the primary electric supplier making the deposit.

(2) Unless otherwise agreed to by the secondary electric supplier and except as provided in subdivision (3) of this section, the primary electric supplier must offer to purchase all of the distribution facilities of the secondary electric supplier utilized by the secondary electric supplier for retail electric service within the existing municipal limits of any particular municipality. The primary and secondary electric supplier shall cooperate in the development of an inventory of such facilities and in the valuation of the facilities to be sold and other consideration to be paid in accordance with the principles set forth in subdivision (4) below. The secondary electric supplier shall also furnish to the primary electric supplier an accurate record of the revenues billed to customers of the secondary electric supplier located within the existing municipal limits of the municipality for the 12 months preceding the date of notice from the primary electric supplier of its exercise of the option to purchase facilities. The secondary electric supplier shall also provide the primary electric supplier with such information as is available to the secondary electric supplier concerning title to the distribution facilities. Within three months after initial notice has been given to the secondary electric supplier, if agreement has not been reached as to the inventory of facilities to be acquired and the value thereof or other consideration to be paid, the primary electric supplier shall be entitled to provide, in writing, is proposal listing the distribution facilities to be acquired, stating its estimate of the value and listing its evaluation of other consideration to be paid

in accordance with subdivision (4) hereof. Within 30 days after receipt of any such proposal, the secondary electric supplier shall state its objections, if any, to the matters contained in such proposal. If the secondary electric supplier fails to submit objections within such 30-day period, the proposal submitted by the primary electric supplier shall be conclusive as to the matters contained therein. If the secondary electric supplier does provide written objections, any dispute between the parties shall be resolved by mutual agreement or by the procedure set forth in Section 37-14-6.

(3) Each affected secondary supplier shall have the right to continue to provide retail electric service in accordance with its established rules and regulations, without time limitation, to any premises within the existing municipal limits of any municipality, the electric load of which (a) was 800 kilowatts or greater for three consecutive months during the three years prior to January 1, 1984; or (b) is served from a substation or step-down transformer from 44 kilovolts or higher which is devoted exclusively to service to the particular premises.

(4) The reproduction cost new, less depreciation, of the facilities to be acquired shall be determined as of 30 days prior to the date established for the closing of the acquisition. The faclities transferred shall be conveyed by warranty deed, "as is, where is," without warranty, express or implied, as to the condition of the facilities. In addition to such reproduction costs, the primary electric supplier shall (i) reimburse the secondary electric supplier the costs to the secondary electric supplier for removal of its meters which are excluded from the definition of distribution facilities in Section 37-14-5(i); (ii) reimburse the secondary electric supplier the cost of constructing any necessary facilities to reintegrate the system of the secondary electric supplier after detaching the portion to be

sold to the primary electric supplier such that the reinegrated system and supply of power and energy thereto in those areas that will continue to be served by the secondary electric-supplier will be as adequate and dependable as exists prior to the sale; such reimbursement to include the cost of removal and to be reduced by the salvage value of any facilities removed by the secondary electric supplier; (iii) reimburse the secondary electric supplier its original cost depreciated for facilities of the secondary electric supplier excluded from the definition of distribution facilities under Section 37-14-5(ii) in which case the primary electric supplier shall take title to such facilities or, at the option of the secondary electric supplier, reimburse the secondary electric supplier the cost of removal, in which case the secondary electric supplier shall retain title; and (iv) pay to any wholesale supplier of the secondary electric supplier (or if the secondary electric supplier does not purchase its electric supply at wholesale then to the secondary electric supplier) the original cost depreciated of any facilities other than distribution facilities, as described in Section 37-14-5(iii), rendered useless by such acquisition of the distribution system of the secondary electric supplier; provided, however, at the election of the owner of such facilities, the payment to be made shall be the cost to such owner of relocating such facilities. The primary electric supplier shall pay the secondary electric supplier the amount determined pursuant to this chapter for reproduction cost new less depreciation of the distribution facilities together with the amount due under subdivision (4)(i), (ii), (iii) and (iv) immediately upon transfer of title to the facilities. In addition, to compensate the secondary electric supplier for the loss of future revenues from presently served or future developing premises, and not as compensation for the sale of its facilities, the primary electric supplier shall pay to the secondary electric supplier an amount

equal to two and one-half times the total revenue from electric sales derived by the secondary electric supplier from customers within the existing municipal limits during the 12 months prior to the date notice is given by the primary electric supplier of its election to purchase the facilities. This amount shall be paid in 10 equal annual installments beginning on the date the sale of facilities is consummated.

(5) Each affected secondary electric supplier shall have the right to continue to provide service to premises located within the existing municipal limits until such time as the primary electric supplier exercises its option to purchase and until such purchase is consummated pursuant to the procedures established herein. In the event the electric facilities of the secondary electric supplier are subject to an option to purchase as provided herein, the secondary electric supplier shall have the right to continue to maintain such facilities and retail electric service until the primary electric supplier purchases the facilities of the secondary electric supplier; and in the event the primary electric supplier does not exercise the option to purchase the facilities of the secondary electric supplier as provided in this section, the secondary electric supplier shall have the right to continue to maintain its facilities and service and make extensions to serve new premises within the existing municipal limits under the standards set forth in Section 37-14-3, notwithstanding the lack of a franchise from the municipality in which such premises are located. The primary electric supplier shall be prohibited from extending service to such new or existing premises. (Acts 1984, No. 84-206, p. 314, § 4.)

**§ 37-14-5. Distribution facilities.**

The term "distribution facilities" as used in Section 37-14-4 shall include distribution lines and other facilities constructed or installed by the electric supplier in the area

to which the purchase option applies, for the rendering of retail electric service except (i) meters, (ii) distribution transformers of voltages not compatible with those of the acquiring electric supplier, (iii) substations of such a voltage that are not compatible with operations of the acquiring electric supplier, (iv) facilities for provision of service by the secondary supplier to premises the electric load of which such secondary supplier may continue to serve under Section 37-14-4(3), and (v) such facilities designated by the supplier as necessary to continue its service in an area not subject to the purchase option herein or to serve such supplier's own load. (Acts 1984, No. 84-206, p. 314, § 4.)

**§ 37-14-6. Resolution of disputes regarding purchases of facilities, etc.**

In the event that a dispute should arise between two or more electric suppliers in connection with the purchase of distribution facilities under Section 37-14-4, the primary electric supplier involved may petition the circuit court for the judicial circuit in which the distribution facilities to be purchased are located to determine such matters as are in dispute between the parties. If the purchase of distribution facilities proposed to be purchased under the notice described in Section 37-14-4(1) is not closed within six months after the date of the notice and if the primary electric supplier has not filed a petition for resolution of disputes in the appropriate court within 14 days after six months from the date of the notice, then the primary electric supplier's exercise of the option shall be void and of no further effect and the primary electric supplier shall have no right to purchase such facilities thereafter.

If a petition is filed with the appropriate circuit court, the sale of the facilities shall be closed within 90 days from the date of the issuance of a final order of the circuit court (or from the date of the decision of an appellate court if such matter is appealed). If the closing is not completed within such 90 days due to the failure of the

primary electric supplier to close for any reason, the primary electric supplier's exercise of the option shall be void and it shall thereafter have no further right to purchase the distribution facilities covered by the notice. (Acts 1984, No. 84-206, p. 314, § 5; Acts 1984, 2nd Ex. Sess. No. 85-45, p. 68, § 1.)

**§ 37-14-7. Applicability of certain provisions of Title 37.**

With respect to any sale of facilities consummated pursuant to the provisions of this article, the provisions of Section 37-1-50 shall not be applicable to such sale or to the cessation by a utility of rendering service from such facilities involved in such sale. To the extent of any conflict between this article and the provisions of Section 37-4-60 through Section 37-4-65, the provisions of this article shall govern and control. (Acts 1984, No. 84-206, p. 314, § 6.)

**§ 37-14-8. Exemptions.**

The separate agreements listed below which have heretofore been entered into between, or negotiated between retail electric suppliers, have been reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in this article. In areas to which these agreements are applicable, the procedures for elimination and prevention of duplication of electric distribution facilities set forth in these agreements shall govern. The following agreements are therefore mandated by the State of Alabama to be applicable:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 12, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983 regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Covington Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Enterprise, Alabama.

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Coosa Valley Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Lincoln, Alabama.

(7) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 2, 1984 regarding electric service areas in Ozark, Alabama.

(8) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 2, 1984 regarding electric service in areas of Randolph and Tallapoosa Counties, Alabama.

(9) Agreement among Covington Electric Cooperative, the City of Elba, Alabama and the City of Elba Water and Electric Board dated as of January 2, 1984 regarding electric service in and around Elba, Alabama.

(10) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 2, 1984 regarding electric service areas in Flomaton and Brewton, Alabama.

(11) Agreement between South Alabama Electric Cooperative, Inc. and the City of Troy, Alabama dated as of October 14, 1983 regarding electric service in areas around Troy, Alabama.

(12) Agreement between the Utilities Board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

Subsequent to April 26, 1984, suppliers shall be permitted to enter into mutual agreements, approved by the respective governing bodies of all suppliers, affected by the agreement respecting the nonduplication of lines, that are consistent with the purposes and policies set forth in this article; provided, however, that no subsequent agreement shall be valid unless and until it has been reviewed and approved by the legislature and the legislature's approval has been evidenced by an amendment to this section of the article enacted prior to July 1, 1985. (Acts 1984, No. 84-206, p. 314, § 7.)

**§ 37-14-9. Action for injunction or damages for violation of article authorized; procedure.**

(a) If an electric supplier commences construction of facilities in violation of the provisions of this article, any aggrieved electric supplier which is designated herein as the entity to provide such service (the "aggrieved electric supplier") may petition the circuit court for the judicial circuit in which the facilities are being constructed by the offending electric supplier for an injunction to prevent the offending electric supplier from completing the facilities for provision of the retail electric service in question.

(b) If an electric supplier believes that another electric supplier has already rendered or extended electric service at retail to a premise which was designated to be served by the aggrieved electric supplier, the aggrieved electric supplier shall give notice in writing to the offending electric supplier of the potential violation of this

article. The offending electric supplier shall have 45 days to determine whether it is in violation of this article. If the offending electric supplier concludes that it is violating this article, it may cease rendering and extending electric service at retail to the premises in question at the time and upon the schedule designated in writing by the aggrieved electric supplier and the offending electric supplier shall have no liability to the aggrieved electric supplier for violation of this article. If the offending electric supplier does not cease rendering service and remove its distribution facilities within the 45-day period or within such longer period designated by the aggrieved electric supplier, the aggrieved electric supplier may file suit in the circuit court for the judicial circuit in which the rendition or extension occurs to enjoin the offending electric supplier from continuing such rendition or extension and for damages. If a violation of this article is proved, the offending electric supplier shall (1) remove its facilities constructed for the rendition of retail electric service to the premises at the time and upon the schedule designated in writing by the aggrieved electric supplier; and (2) pay to the aggrieved electric supplier 25 percent of the gross revenues derived by the offending electric supplier from the sale of electric service in violation of this article from and after the date that is 45 days after the date on which the notice of violation was given. In addition, the offending electric supplier shall reimburse the aggrieved electric supplier for all witness fees, court costs, reasonable attorneys fees and other expenses incurred in any litigation to enforce the aggrieved electric supplier's rights under this article. If the violation is not proved, the aggrieved electric supplier shall reimburse the offending electric supplier for all witness fees, court costs, reasonable attorneys fees and other costs incurred in the litigation. All actions or proceedings for injunction or for damages shall be brought within three years after the offending electric supplier first renders or extends electric service at retail in violation of this article. (Acts 1984, No. 84-206, p. 314, § 8.)

**§ 37-14-10. Authorization for validation, etc., of provisions of article; procedure.**

In order to foster and encourage the underlying policies of this article and to assure that sales and purchases of distribution facilities, and other transactions and actions authorized or allowed by this article may be conducted in good faith with a knowledge of the consequence and the validity thereof and further, to assure that irrevocable commitments are not made in the implementation of the provisions of this article without the assurance of their legality and validity, the following judicial review process is hereby authorized and it is declared to be the legislative intent that the provisions of this statute be judicially reviewed and validated pursuant to the procedure set forth herein and that the circuit court enter a judgment in accordance with the procedure set forth herein. (Acts 1984, No. 84-206, p. 314, § 9.)

**§ 37-14-11. Judicial determination of legality, etc., of article—Filing of complaint.**

At any time subsequent to April 26, 1984, an affected secondary electric supplier whose distribution facilities are subject to the provisions of this article and whose facilities may be purchased pursuant to this article by a primary electric supplier may, in its discretion before the closing of such purchase, seek judicial determination of the legality and validity of such purchase of facilities pursuant to the provisions of this article, and all other questions of the legality or validity of the provisions of this article. Such judicial determination shall be had upon the filing of a complaint against the citizens of the State of Alabama and against the affected primary electric supplier. Such complaint shall be filed in the circuit court of Montgomery County, Alabama which shall have exclusive venue for the determination of all questions of the legality and validity of the provisions of this article. The filing of any such complaint shall stay the dates

established for the closing of all sales of facilities pursuant to the provisions of this article until, with respect to each situation in which intent to exercise the option to purchase has been announced, a date is established by the mutual agreement of the affected primary and secondary electric supplier, which date shall not be in excess of 90 days after the final resolution of the action to determine the legality and validity of the proposed transaction as well as the legality and validity of this article, including any appeal therefrom. (Acts 1984, No. 84-206, p. 314, § 9.)

**§ 37-14-12. Judicial determination of legality, etc., of article—Contents of complaint; order and notice of hearing to show cause; intervention.**

(a) The complaint by appropriate allegations, references and/or exhibits shall briefly state the following: the authority for the purchase and sale of distribution facilities and other transactions and restrictions under this article; the nature of any franchise heretofore issued by a municipality which will be affected; a general description of restrictions imposed by this article; the proposed date when the purchase and sale or other transaction is to be effective, and the impact which such restrictions and sale shall have on the parties and the public.

(b) The judge of said court shall, upon the filing and presentation of said complaint, issue an order against the citizens of the state, and other defendants requiring them to show cause, at a time and place to be designated in said order, which time shall be not less than 35 days nor more than 56 days after the issuance of such order, and which place shall be within Montgomery County, why said purchase and sales and the other transactions and restrictions and all other proceedings under this article should not be validated and confirmed.

(c) The Attorney General of the State of Alabama shall be the designated representative of the citizens of

the State of Alabama and shall appear on their behalf for all purposes in any proceeding brought pursuant to this section.

(d) Prior to the hearing of said cause, the clerk of said court shall publish, in a newspaper of general circulation published in Montgomery County, once each week for at least three weeks before the hearing, the first publication which would be at least 21 days before such hearing, a notice addressed to the citzens of the State of Alabama requiring them, at the time and place specified in the order providing for the hearing of such case, to show cause, if any there be, why said purchase and sale or other transaction and restriction that may be referred to in the complaint should not be validated and confirmed. In addition, the clerk of said court shall also publish notice to the citizens of the state in newspapers of general circulation customarily published not less often than five days during each calendar week in the Cities of Andalusia, Birmingham, Dothan, Florence, Gadsden, Huntsville, Mobile, Selma and Tuscaloosa. By the publication of such notice, all citizens of the state shall become parties defendant to such proceedings, and the court shall have jurisdiction of them the same as if each of them were named individually as party defendants in said complaint and personally served with process.

(e) In addition to the publication and notice set forth in subsection (d) of this section, the clerk of the Circuit Court in Montgomery County shall also cause a summons and complaint to be served upon the Attorney General of the State of Alabama as representative of all citizens of the State of Alabama and upon all other parties named as defendants in the action.

(f) The plaintiff shall certify to the court, in writing, with an attached list, that it has mailed a copy, by certified mail, return receipt requested, of the complaint filed in the action to each other electric supplier in the state, as defined in this article. Said notice to said electric sup-

pliers shall inform them of the time and place of the hearing and shall contain a copy of the complaint filed herein. The notice required by this paragraph shall be mailed not less than 21 days prior to the date set for the hearing.

(g) Each electric supplier which receives notice pursuant to the provisions set forth in subsection (f) above, or which receives notice in any manner whatsoever of this action, may petition the court, as a matter of right, to intervene in said action and to participate in the hearing provided for in subsection (f) above.

(h) The failure of any electric supplier, municipality and/or governmental unit to exercise the right to intervene and participate in the hearing shall be deemed a waiver of any right such electric supplier, municipality or governmental unit may have to participate and to challenge, contest or otherwise question the validity of any purchase, sale and/or transaction made or proposed to be made pursuant to this article or to challenge the validity of any of the provisions of this article. (Acts 1984, No. 84-206, p. 314, § 9.)

**§ 37-14-13. Judicial determination of legality, etc., of article—Hearing; entry of judgment; appeals.**

At the time and place designated in said order, the judge of said circuit court shall proceed to hear and determine all questions of law and of fact in said civil action, and he shall make such order, or orders, as to the proceedings in said civil action as will best preserve and protect the interests of all parties and to enable him to enter a final judgment with the least possible delay. The final judgment shall find the facts specially and shall state separately the judge's conclusions with regard to any and all legal issues raised with regard to any of the provisions of this article and proposed purchase and sale of distribution facilities and other transactions and restrictions under this article, together with other matters

raised in the complaint, and shall state the judge's conclusions of law thereon. Any citizen of the state may appear in such proceedings, either personally or by attorney, and any party thereto, whether plaintiff, defendant or intervenor, dissatisfied with the judgment of the court may appeal therefrom to the Supreme Court of Alabama in accordance with the Alabama Rules of Appellate Procedure. Such appeal shall take priority in the supreme court over all other cases therein pending, except petitions for writs of habeas corpus. (Acts 1984, No. 84-206, p. 314, § 9.)

**§ 37-14-14. Judicial determination of legality, etc., of article—Finality of judgment.**

If the circuit court shall enter a judgment validating and confirming the propriety of the provisions of this article and purchases and sales, other transactions and restrictions under this article and no appeal shall be taken within the time prescribed within the Alabama Rules of Appellate Procedure; or, if an appeal is taken and the judgment validating the provisions of this article and such purchases and sales, other transactions and restrictions shall be affirmed by the supreme court; or, if the circuit court shall render a judgment refusing to validate and confirm the provisions of this article and/or the purchase and sale, other transactions or restrictions pursuant to this article, and on appeal such judgment shall be reversed by the supreme court (in which case the supreme court shall issue its mandate to the circuit court requiring it to enter a judgment validating the provisions of this article and confirming the proposed purchase, sale, or other transactions or restrictions), the judgment of the circuit court validating and confirming the provisions of this article and the purchase and sale, other transactions and restrictions, shall be forever conclusive as to the validity of the provisions of this article, and shall be conclusive as to the validity of any purchase and sale,

other transactions or restrictions or extension of electric service rendered pursuant to this article as against all citizens of the state, electric suppliers and municipalities and the other governmental units. (Acts 1984, No. 84-206, p. 314, § 9.)

**§ 37-14-15. Judicial determination of legality, etc., of article—Costs of proceedings.**

The court costs in any proceeding brought under this article shall be paid by the electric supplier commencing the action. (Acts 1984, No. 84-206, p.314, § 9.)

**§ 37-14-16. Applicability of article.**

No action shall be commenced challenging the legality or validity of the provisions of this article, or the legality or validity of a purchase and sale transaction or restriction under this article where the legality or validity of this article is in controversy in any prior pending civil action or proceeding in any court or has been determined in any such action. In the event any action is pending in any circuit in the state which raises or challenges the legality or validity of any provision of this article at the time an action is filed under this section, such pending action shall be transferred to the Circuit Court of Montgomery County and shall be consolidated with the action filed pursuant to this section and the consolidated proceeding shall be adjudicated in accordance with the procedures set forth in this article. (Acts 1984, No. 84-206, p. 314, § 9.)

**§ 37-14-17. Severability.**

The provisions of this article are not severable. If any part of this article is declared invalid under the constitution or laws of this state, such declaration shall render invalid all parts which remain. Notwithstanding such invalidity, action taken by any party in conformity with the provisions of this article shall be considered lawful

actions by such party; provided, however, any electric service rendered which would have been illegal or unlawful or violative of any contractual provision absent this article shall be terminated and the facilities shall be removed following any determination of the invalidity of this article. (Acts 1984, No. 84-206, p. 314, § 9.)

# APPENDIX I

## ARTICLE 2

## 1985 ACT

### § 37-14-30. Declaration of findings and policy; relationship to 1984 act.

The Legislature of the State of Alabama has investigated the economic, financial and environmental impact associated with the potential for duplication of electric distribution facilities used for the furnishing of retail electric service. It has been determined that with respect to retail electric sales, the benefit normally associated with competition between two or more entities for customers is outweighed by the tremendous cost burden which must be borne by such customers associated with the maintenance of two or more duplicate sets of facilities. It is the further finding of the legislature that the existence of duplicate facilities for the furnishing of electricity at retail is not in the public interest because of the adverse impact which such duplication has on environmental and aesthetic values and on safety. It is therefore declared that the policy of the State of Alabama is to ensure effective, economical and orderly supply of electric service at retail to customers in the state and to avoid unnecessary duplication of facilities by electric suppliers for the furnishing of such services which would result in waste and in degradation of the environment. To accomplish these objectives, it is necessary and in the public interest to establish, mandate and implement procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the state including areas within the corporate limits of municipalities in the state. The rules established herein for elimination of duplication of electric facilities may result in the requirement that a municipality grant consent to service by a particular electric supplier if the municipality desires that such area be supplied with electric service. Such rules are deemed essential by the legis-

lature in the exercise of police power of the state to eliminate wasteful duplication of electric facilities. Contracts entered into by municipalities for the purpose of securing loans pursuant to Section 11-50-11, or pursuant to any other provision of law, which restrict the grant by the municipality of a municipal franchise or consent shall not be interpreted as applying to any area of the municipality other than the areas of the city in which the municipal electric system was located on May 20, 1985. The determinations and statements of policy set forth above are similar to those contained in Act No. 84-206 of the Alabama Legislature, regular session, 1984. Act No. 84-206 was declared invalid by the Federal District Court for the Middle District of Alabama. It is the conclusion of the legislature that such determination was improper and should be reversed, leaving valid Act No. 84-206. In the event Act No. 84-206 is hereafter declared to be valid on appeal of the decision of the federal district court, it is the intent of the legislature that Act No. 84-206 not be repealed by this article but shall be considered valid and binding in lieu of the provisions of this article. It is the intent of the legislature that this article establish rules for elimination of duplication of facilities which shall apply to lines constructed after January 1, 1984. It has been determined that no electric supplier should be permitted to retain facilities built inconsistent with the provisions of Act No. 84-206, even though, if Act No. 84-206 is not reinstated, such construction was not prohibited by law. It has been determined further that compensation for facilities should be made in accordance with the provisions of subdivision (6) of Section 37-14-32. (Acts 1985, No. 85-645, p. 983, § 1.)

**§ 37-14-31. Definitions.**

As used in this article the following terms shall have the following meanings, respectively, unless the context clearly indicates otherwise;

(1) ELECTRIC SUPPLIER. Any municipality, municipally-owned utility or other governmental entity, any cooperative, corporation, person, firm, association or other entity engaged in the business of supplying electric service at retail; provided, however, that no person or entity, including the Tennessee Valley Authority, who may not be lawfully regulated by the state by virtue of powers granted by the laws of the United States which prevail over Alabama statutes, nor any university, college or United States agency which distributes electricity at retail shall be deemed an electric supplier for the purpose of this article.

(2) ELECTRIC SERVICE AT RETAIL and RETAIL ELECTRIC SERVICE. Electric service furnished to a customer for ultimate consumption, but does not include wholesale electric service furnished by an electric supplier to another electric supplier for resale.

(3) PREMISES. The building, structure or facility to which electricity is being metered or is to be furnished and metered, including all meters on such building, structure or facility through which electricity is delivered or to be delivered. Such term shall also include any building, structure or facility which is reconstructed to replace a previously existing building, structure or facility of substantially the same size. In the event two or more buildings, structures, or facilities are located on one tract of land utilized by one customer, those buildings, structures, or facilities which are or will be served through a different meter shall be considered a separate premises.

(4) DISTRIBUTION LINE. An electric conductor which is operated at 35,000 volts or less, up to but not including the service drop. The service drop shall be that line from the last pole or last transformer on the distribution system to the premises.

(5) EXISTING DISTRIBUTION LINE. A distribution line in existence on January 1, 1984.

(6) PRIMARY ELECTRIC SUPPLIER. That electric supplier for each municipality existing on January 1, 1984 serving a plurality of the premises within the existing municipal limits to which service is actually being supplied and metered on January 1, 1984.

(7) SECONDARY ELECTRIC SUPPLIER. Any electric supplier serving within existing municipal limits which is not the primary electric supplier.

(8) EXISTING MUNICIPAL LIMITS. The corporate boundaries of any municipality as such boundaries existed on April 26, 1984.

(9) MUNICIPAL CONSENT or CONSENT OF THE MUNICIPALITY. The approval by a city or town pursuant to Section 220 of the Alabama Constitution of the use of the streets, avenues, alleys or public places of the city or town evidenced by appropriate action of the proper authorities of the city or town.

(10) REPRODUCTION COST NEW LESS DEPRECIATION. The total investment that would be required by the electric supplier selling the facilities to duplicate the facilities to be sold at the time of such sale utilizing then current costs for all materials, supplies, labor, land and land rights, transportation, and miscellaneous direct and indirect expenses (including overhead, engineering and supervision costs that are normally capitalized) that would be required; the costs that would be required to obtain all necessary approvals and permits; and any other costs that would be appropriately applicable to the reproduction of the facilities, less an amount representing the straight line depreciation of such reproduction costs of any depreciable items over an assumed life of 30 years for electric distribution facilities for that period of time equal to the age of the items of the electric distribution facilities being transferred. In no event, however, shall any item be depreciated more than 30 percent of the reproduction costs new of that item,

so that in no event shall reproduction cost new less depreciation be less than 70 percent of the reproduction cost of such item.

(11) INDUSTRIAL CUSTOMER. A customer utilizing electric service at a premises at which the predominate activity is classified as mining, manufacturing, transportation, communication, electric, gas and sanitary services, or miscellaneous repair services in the Standard Industrial Classification Manual, Part I, Division B, D and E and Major Group 76 of Division I as published in 1972 by the statistical policy division of the United States Office of Management and Budget.

(12) NEW INDUSTRIAL CUSTOMER. An industrial customer who constructs a new premises on a site not previously occupied by an industrial customer. (Acts 1985, No. 85-645, p. 983, § 2.)

**§ 37-14-32. Electric service outside existing municipal limits.**

Except as otherwise provided in subdivisions (2), (3), (4) and (6) but notwithstanding any other provision of this article, in areas outside existing municipal limits (including areas annexed to municipalities on or after April 26, 1984), no electric supplier shall construct or maintain electric distribution lines for the provision of retail service to any premises being provided retail electric service by another electric supplier, or to any new premises located within the boundaries of assigned service areas of another electric supplier. Assigned service areas outside existing municipal limits are hereby established as set forth in this section.

(1) Except as specified in subdivisions (2) and (3) herein, each electric supplier is hereby granted a legislative franchise and assigned the sole obligation, in areas outside existing municipal limits and within existing municipal limits to the extent the

standards of this section are made applicable by subdivision (a)(5) of Section 37-14-33, for provision of retail electric service to all new premises located in closer proximity to existing distribution lines of such supplier than the nearest existing distribution lines of any other electric supplier (including areas annexed to municipalities on or after April 26, 1984 whether or not a municipal franchise has been granted to the electric supplier to whom an area annexed has been assigned or to any other electric supplier) such legislative franchise being subject, nevertheless, to consent of the municipality with respect to any construction or operation for which a municipal consent is required. Electric service shall be rendered by the electric supplier to whom responsibility has been assigned in accordance with its established rules and regulations. No other electric supplier shall render electric service to such premises. Thus, the assigned service area of each electric supplier in areas outside existing municipal limits is defined as the area or areas consisting of a line or lines drawn equidistant between the existing distribution lines of such electric supplier and the nearest existing distribution line of any other electric supplier. Where a premises is located in the assigned service area of two electric suppliers, the supplier in whose assigned area the majority of the square footage of the premises fall shall provide the service. The above prohibitions and assignments shall also apply to areas within the existing municipal limits in the event the primary electric supplier fails to exercise the option to purchase set forth in Section 37-14-33 subject, nevertheless, to the consent of the municipality with respect to any construction or operation for which a municipal consent is required.

(2) Notwithstanding the above limitations stated in this section on construction of facilities to serve customers in areas outside existing municipal limits,

an electric supplier may construct, operate and maintain facilities for provision of retail electric service to any new industrial customer not presently or previously served by another electric supplier, in an area outside existing municipal limits where the initial electric service requirement to such industrial customer, under normal operations and with a six month growth period permitted from date of initial service, is equal to or greater than 2500 kilowatts as measured over a 15 minute integrated period, upon written request to such electric supplier by the industrial customer to be served.

(3) Notwithstanding subdivision (2) hereof, no municipality or municipally-owned electric supplier shall provide retail electric service in any area outside existing municipal limits unless the premises to be so served is in the assigned service area of such electric supplier.

(4) The foregoing limitations shall not prevent an electric supplier from constructing electric facilities to serve its own premises used or to be used in its electric operations and other premises owned and occupied solely and exclusively by the electric supplier, or a municipality which appoints the governing body of such electric supplier or any agency of said municipality whose governing body is appointed by that municipality.

(5) Within nine months after May 20, 1985, all electric suppliers having existing distribution lines in each county in the state shall exchange maps of such facilities (as of January 1, 1984) located within the county. These maps shall be sufficiently detailed to permit the development of a definitive understanding of the electric supplier designated to serve under the guidelines set forth in subdivision (1) above. The legislature recognizes that the vast majority of existing distribution lines within existing municipal limits

will have no effect on the assigned service areas determined in accordance with this section and electric suppliers may, at their option, elect not to show existing distribution lines which do not affect the assigned service areas.

(6) In the event an electric supplier has constructed, after January 1, 1984 and prior to May 20, 1985, electric distribution facilities to provide electric service at retail to a premises located in the assigned service area of another electric supplier, the electric supplier in whose assigned service area the facilities are located shall, at its option, have the right to acquire such facilities. Such option shall be exercised in the same manner, at the same time, and shall be subject to the same compensation provisions, specified in Section 37-14-33; provided, however, no escrow of funds shall be required in connection with such purchase. If the electric supplier in whose area the electric distribution facilities are located fails to exercise its option to acquire such facilities, the owner of such facilities shall be authorized to maintain such facilities to provide service to premises being served as of May 20, 1985; but shall not extend service from such faciliites to new premises in violation of the principles set forth in this section.

(7) Neither (i) municipal annexations after April 26, 1984, nor (ii) the construction or removal of any facilities after January 1, 1984, nor (iii) the purchase or sale of any facilities after May 20, 1985, consummated under the provisions of this article shall affect any rights or limitations regarding retail electric service under this section. Any annexation by a municipality pursuant to the laws of this state shall be subject to and conditioned upon recognition of the provisions of this article. (Acts 1985, No. 85-645, p. 983, § 3.)

**§ 37-14-33. Retail electric service within municipalities.**

(a) *Primary supplier's option to acquire facilities within existing municipal limits.*—The primary electric supplier within each municipality shall, at its option, have the right to acquire all distribution facilities of any secondary electric supplier used to supply retail electric service within the existing municipal limits and shall have the right to serve all premises within the existing municipal limits of such municipality subject to the provisions of subdivisions (a)(1) through (a)(5). Except as authorized in this section, no secondary electric supplier shall extend facilities to serve existing or new premises within the existing municipal limits of the municipality.

(1) The primary electric supplier must announce its intention to exercise its option to acquire the distribution facilities of secondary electric suppliers by giving written notice by registered or certified mail to the affected secondary suppliers within each municipality, addressed to the chief executive officer or manager of such secondary supplier, no later than 30 days after May 20, 1985. This notice shall be referred to in this article as the "initial notice of intent to purchase." Within nine months after May 20, 1985, the primary electric supplier shall deposit in escrow with a bank whose principal office is in Alabama and which has capital and surplus not less than $5,000,000.00, or with any other escrow agent agreeable to the parties, the amount of $1,000.00 for each premises receiving electricity from the distribution facilities proposed to be purchased by the primary electric supplier on the date of the escrow notice defined below, based on the primary electric supplier's good faith estimate of the number of premises involved. Simultaneously with such deposit, the primary electric supplier shall give notice by registered or certified mail to the affected secondary supplier of the amount and date of the deposit. This notice shall be referred to in this article as the "escrow notice."

Failure to make the escrow deposit within nine months after May 20, 1985, shall constitute a forfeiture of the option granted to the primary supplier hereunder, but such failure to make such escrow deposit shall not create any liability of the primary supplier to the secondary supplier. In such event, provision of electric service shall be governed by the rules set forth in subdivision (a)(5). The secondary supplier shall, within seven days after receipt of the escrow notice, provide the actual number of premises involved, if different from that estimated by the primary supplier, and the escrow deposit made by the primary supplier shall be adjusted to accommodate any difference within seven days after such actual number of premises is supplied. The escrow agent shall be directed and authorized to invest the funds placed in escrow by the primary electric supplier in any investment directed by the primary electric supplier. The escrow agent is further authorized, upon election of the primary electric supplier making the deposit, to combine for investment any other deposit made by that depositor for the same purpose with respect to different facilities. The escrow agent shall render periodic accountings as to the escrow account to the primary electric supplier and the secondary electric supplier. If the purchase is consummated in accordance with this article, the funds shall be used to satisfy the purchase price of the facilities and other consideration to be paid by the primary electric supplier to the secondary electric supplier due as of the date of closing as determined under this section. Any portion of such fund in excess of the amount due to be paid to the secondary electric supplier on the date of closing shall be refunded to the primary electric supplier. If the amount due to be paid by the primary electric supplier to the secondary electric supplier under this section on the date of closing is in excess of the amount in the escrow account, the primary electric supplier shall pay the difference to

the secondary electric supplier at closing. If the closing of the facilities is not consummated because of the failure of the primary electric suppliers to pursue its option under this article to purchase the distribution facilities, the escrow agent shall be instructed to deliver from the escrow fund to the secondary electric supplier, 14 days after the date on which the primary electric supplier's rights to purchase the facilities expire unconsummated, the interest earned on the amount deposited from investment of such funds plus 10 percent of the amount originally deposited by the primary electric supplier. The balance of such escrow funds shall be returned to the primary electric supplier making the deposit.

(2) Unless otherwise agreed to by the secondary electric supplier and except as provided in subdivision (a)(3), the primary electric supplier must offer to purchase all of the distribution facilities of the secondary electric supplier utilized by the secondary electric supplier for retail electric service within the existing municipal limits of any particular municipality. The primary and secondary electric supplier shall cooperate in the development of an inventory of such facilities and in the valuation of the facilities to be sold and other consideration to be paid in accordance with the principles set forth in subdivision (a)(4) below. The secondary electric supplier shall also furnish to the primary electric supplier an accurate record of the revenues billed to customers of the secondary electric supplier located within the existing municipal limits of the municipality for the 12 months preceding the date of the escrow notice from the primary electric supplier of its exercise of the option to purchase facilities. The secondary electric supplier shall also provide the primary electric supplier with such information as is available to the secondary electric supplier concerning title to the distribution facilities. Within three months after the escrow no-

tice has been given to the secondary electric supplier, if agreement has not been reached as to the inventory of facilities to be acquired and the value thereof or other consideration to be paid, the primary electric supplier shall be entitled to provide, in writing, its proposal listing the distribution facilities to be acquired, stating its estimate of the value and listing its evaluation of other consideration to be paid in accordance with subdivision (a)(4) hereof. Within 30 days after receipt of any such proposal, the secondary electric supplier shall state its objections, if any, to the matters contained in such proposal. If the secondary electric supplier fails to submit objections within such 30 day period, the proposal submitted by the primary electric supplier shall be conclusive as to the matters contained therein. If the secondary electric supplier does provide written objections, any dispute between the parties shall be resolved by mutual agreement or by the procedure set forth in Section 37-14-34.

(3) Each affected secondary supplier shall have the right to continue to provide retail electric service in accordance with its established rules and regulations, without time limitation, to any premises within the existing municipal limits of any municipality, the electric load of which a. was 800 kilowatts or greater for three consecutive months during the three years prior to January 1, 1984; or b. is served from a substation or step-down transformer from 44 kilovolts or higher which is devoted exclusively to service to the particular premises.

(4) The reproduction cost new, less depreciation, of the facilities to be acquired shall be determined as of 30 days prior to the date established for the closing of the acquisition. The facilities transferred shall be conveyed by warranty deed, "as is, where is", without warranty, express or implied, as to the condi-

tion of the facilities. In addition to such reproduction costs, the primary electric supplier shall

a. Reimburse the secondary electric supplier the costs to the secondary electric supplier for removal of its meters which are excluded from the definition of distribution facilities in item (1) of subsection (b);

b. Reimburse the secondary electric supplier the cost of constructing any necessary facilities to reintegrate the system of the secondary electric supplier after detaching the portion to be sold to the primary electric supplier such that the reintegrated system and supply of power and energy thereto in those areas that will continue to be served by the secondary electric supplier will be as adequate and dependable as exists prior to the sale; such reimbursement to include the cost of removal and to be reduced by the salvage value of any facilities removed by the secondary electric supplier;

c. Reimburse the secondary electric supplier its original cost depreciated for facilities of the secondary electric supplier excluded from the definition of distribution facilities under item (2) of subsection (b) in which case the primary electric supplier shall take title to such facilities or, at the option of the secondary electric supplier, reimburse the secondary electric supplier the cost of removal, in which case the secondary electric supplier shall retain title; and

d. Pay to any wholesale supplier of the secondary electric supplier (or if the secondary electric supplier does not purchase its electric supply at wholesale then to the secondary electric supplier) the original cost depreciated of any facilities other than distribution facilities,

as described in item (3) of subsection (b), rendered useless by such acquisition of the distribution system of the secondary electric supplier; provided, however, at the election of the owner of such facilities, the payment to be made shall be at the cost to such owner of relocating such facilities.

The primary electric supplier shall pay the secondary electric supplier the amount determined pursuant to this article for reproduction cost new less depreciation of the distribution facilities together with the amount due under paragraphs a, b, c, and d of this subdivision immediately upon transfer of title to the facilities. In addition, to compensate the secondary electric supplier for the loss of future revenues from presently served or future developing premises, and not as compensation for the sale of its facilities, the primary electric supplier shall pay to the secondary electric supplier an amount equal to two and one-half times the total revenue from electric sales derived by the secondary electric supplier from customers within the existing municipal limits during the 12 months prior to the date escrow notice is given by the primary electric supplier of its election to purchase the facilities. This amount shall be paid in 10 equal annual installments beginning on the date the sale of facilities is consummated.

(5) Each affected secondary electric supplier shall have the right to continue to provide service to premises located within the existing municipal limits until such time as the primary electric supplier exercise its option to purchase and until such purchase is consummated pursuant to the procedures established herein. In the event the electric facilities of the secondary electric supplier are subject to an option to purchase as provided herein, the secondary electric supplier shall have the right to continue to maintain such facilities

and retail electric service until the primary electric supplier purchases the facilities of the secondary electric supplier. Until the purchase of the facilities of the secondary supplier is consummated, the secondary supplier shall have the right, subject to consent of the municipality with respect to any construction or operation for which a municipal consent is required, to provide service to any new premises located closer to the existing distribution lines of the secondary electric supplier than to those of the primary electric supplier or any other electric supplier except for new industrial customers having a size equivalent to that specified in subdivision (2) of Section 37-14-32, if such new industrial customer has requested service from the primary electric supplier. The compensation required for the purchase of the secondary electric supplier's facilities, by the primary electric supplier of facilities built by the secondary electric supplier pursuant to the previous sentence shall be limited to the reproduction costs new, less depreciation, of facilities constructed to serve such new premises and the primary electric supplier shall not be required to pay any of the other costs specified in subdivision (a)(4). In the event the primary electric supplier does not exercise the option to purchase the facilities of the secondary electric supplier as provided in this section, the primary electric supplier and any other electric supplier shall be prohibited from extending its facilities for service to existing premises being served by the secondary electric supplier or to new premises located closer to the existing distribution lines of the secondary electric supplier than to the existing distribution lines of the primary electric supplier or any other electric supplier under the standards set forth in Section 37-14-32. The secondary electric supplier shall have the right to continue to maintain its facilities and service and make extensions to serve new premises within the existing municipal limits under the standards set forth

in Section 37-14-32, notwithstanding the lack of a municipal franchise from the municipality in which such premises are located, subject, nevertheless, to consent of the municipality for construction or use of the streets, avenues, alleys, or public ways of the municipality to the extent such consent is required.

(b) *Distribution facilities to be purchased.*—The term "distribution facilities" as used in subsection (a) shall include distribution lines and other facilities constructed or installed by the electric supplier in the area to which the purchase option applies, for the rendering of retail electric service except (1) meters, (2) distribution transformers of voltages not compatible with those of the acquiring electric supplier, (3) substations of such a voltage that are not compatible with operations of the acquiring electric supplier, (4) facilities for provision of service by the secondary supplier to premises the electric load of which such secondary supplier may continue to serve under subdivision (a)(3), and (5) such facilities designated by the supplier as necessary to continue its service in an area not subject to the purchase option herein or to serve such supplier's own load. (Acts 1985, No. 85-645, p. 983, § 4.)

**§ 37-14-34. Resolution of disputes as to sales or purchases of facilities.**

In the event that a dispute should arise between two or more electric suppliers in connection with the purchase of distribution facilities under Section 37-14-32 or Section 37-14-33, the primary electric supplier involved may petition the circuit court for the judicial circuit in which the distribution facilities to be purchased are located to determine such matters as are in dispute between the parties. If the purchase of distribution facilities proposed to be purchased under the escrow notice described in subdivision (a)(1) of Section 37-14-33 is not closed within six months after the date of the escrow notice and if the

primary electric supplier has not filed a petition for resolution of disputes in the appropriate court within 14 days after six months from the date of the escrow notice, then the primary electric supplier's exercise of the option shall be void and of no further effect and the primary electric supplier shall have no right to purchase such facilities thereafter.

If a petition is filed with the appropriate circuit court, the sale of the facilities shall be closed within 90 days from the date of the issuance of a final order of the circuit court (or from the date of the decision of an appellate court if such matter is appealed). If the closing is not completed within such 90 days due to the failure of the primary electric supplier to close for any reason, the primary electric supplier's exercise of the option shall be void and it shall thereafter have no further right to purchase the distribution facilities covered by the escrow notice. (Acts 1985, No. 85-645, p. 983, § 5.)

**§ 37-14-35. Applicability of certain provisions of Title 37.**

With respect to any sale of facilities consummated pursuant to the provisions of this article, the provisions of Section 37-1-50 shall not be applicable to such sale or to the cessation by a utility of rendering service from such facilities involved in such sale. To the extent of any conflict between this article and the provisions of Section 37-4-60 through Section 37-4-65, the provisions of this article shall govern and control. (Acts 1985, No. 85-645, p. 983, § 6.)

**§ 37-14-36. Special rules for elimination of duplication.**

The separate agreements listed below which have heretofore been entered into between, or negotiated between retail electric suppliers, have been reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set

forth in this article. In areas to which these agreements are applicable, the procedures for elimination and prevention of duplication of electric distribution facilities set forth in these agreements shall govern. The following agreements are therefore mandated by the State of Alabama to be applicable:

(1) Agreement between Cherokee Electric Cooperative (successor to Cherokee County Electric Membership Corporation) and Alabama Power Company dated June 5, 1940.

(2) Agreement among the City of Bessemer, Alabama, Alabama Power Company and the Tennessee Valley Authority dated August 12, 1971.

(3) Agreement between the City of Tarrant City, Alabama and Alabama Power Company dated June 8, 1983 regarding electric service areas in and around Tarrant City, Alabama.

(4) Agreement between Alabama Power Company and Covington Electric Cooperative dated as of January 18, 1985 regarding electric service areas in Enterprise, Alabama.

(5) Agreement between Alabama Power Company and Dixie Electric Cooperative dated as of January 2, 1985 regarding electric service areas in Montgomery and Union Springs, Alabama.

(6) Agreement between Alabama Power Company and Pea River Electric Cooperative dated January 18, 1985 regarding electric service areas in Ozark, Alabama.

(7) Agreement between Alabama Power Company and Tallapoosa River Electric Cooperative dated as of January 18, 1985 regarding electric service in areas of Randolph and Tallapoosa Counties, Alabama.

(8) Agreement among Covington Electric Cooperative, the City of Elba, Alabama and the City of Elba Water and Electric Board dated as of January 29, 1985 regarding electric service in and around Elba, Alabama.

(9) Agreement between Alabama Power Company and Southern Pine Electric Cooperative dated as of January 18, 1985 regarding electric service areas in Flomaton and Brewton, Alabama.

(10) Agreement between South Alabama Electric Cooperative, Inc. and the City of Troy, Alabama dated as of October 14, 1983 and January 31, 1984 regarding electric service in areas around Troy, Alabama, and the sale of distribution facilities.

(11) Agreement between Alabama Power Company and Cullman County Electric Cooperative, Inc. dated as of January 2, 1985 regarding electric service areas in Cullman and Winston counties, Alabama.

(12) Agreement between South Alabama Electric Cooperative, Inc. and the City of Brundidge dated April 11, 1984 regarding electric service in and around the City of Brundidge, Alabama.

(13) Agreement between Southern Pine Electric Cooperative, Inc. and the City of Evergreen, Alabama as such agreement is reflected in the resolution of the city council of the City of Evergreen dated June 6, 1967 relating to electric service in the City of Evergreen.

(14) Agreement between Covington Electric Cooperative and the City of Andalusia reflected in and reaffirmed by the resolution of the City of Andalusia dated January 29, 1985.

(15) Agreement between the utilities board of the City of Cullman and the Cullman Electric Cooperative dated November 5, 1954.

If any agreement specified above is hereafter terminated pursuant to provisions of such agreement authorizing such termination, the rules contained in such agreement shall not, thereafter, be binding for the prevention of duplication of electric facilities from and after the date of termination. After such date, the rules established in Sections 37-14-32 and 37-14-33 hereof shall govern; provided, however, in the event the agreement related to service inside a municipality, the right of the primary electric supplier to exercise an option to purchase facilities under Section 37-14-33 shall be governed by the time limits established in Section 37-14-33.

Nothing in this article shall apply to affect valid regulations or contracts of the Tennessee Valley Authority or other suppliers of electricity who may not be lawfully regulated by the state. Subsequent to May 20, 1985, suppliers shall be permitted to enter into mutual agreements, approved by the respective governing bodies of all suppliers affected by the agreement, respecting the nonduplication of lines, that are consistent with the purposes and policies set forth in this article; provided, however, that no subsequent agreement shall be valid unless and until it has been reviewed by the legislature and the legislature has amended this section to mandate the implementation of the provisions of such agreement. (Acts 1985, No. 85-645, p. 983, § 7.)

### § 37-14-37. Provision of retail electric service in violation of article.

(a) If an electric supplier commences construction of facilities in violation of the provisions of this article, any aggrieved electric supplier which is designated herein as the entity to provide such service (the "aggrieved electric supplier") may petition the circuit court for the judicial circuit in which the facilities are being constructed by the offending electric supplier for an injunction to prevent the offending electric supplier from completing the facilities for provision of the retail electric service in question.

(b) If an electric supplier believes that another electric supplier has already rendered or extended electric service at retail to a premise which was designated to be served by the aggrieved electric supplier, the aggrieved electric supplier shall give notice in writing to the offending electric supplier of the potential violation of this article. The offending electric supplier shall have 45 days to determine whether it is in violation of this article. If the offending electric supplier concludes that it is violating this article, it may cease rendering and extending electric service at retail to the premises in question at the time and upon the schedule designated in writing by the aggrieved electric supplier and the offending electric supplier shall have no liability to the aggrieved electric supplier for violation of this article. If the offending electric supplier does not cease rendering service and remove its distribution facilities within the 45 day period or within such longer period designated by the aggrieved electric supplier, the aggrieved electric supplier may file suit in the circuit court for the judicial circuit in which the rendition or extension occurs to enjoin the offending electric supplier from continuing such rendition or extension and for damages. If a violation of this article is proved, the offending electric supplier shall (1) remove its facilities constructed for the rendition of retail electric service to the premises at the time and upon the schedule designated in writing by the aggrieved electric supplier; and (2) pay to the aggrieved electric supplier 25 percent of the gross revenues derived by the offending electric supplier from the sale of electric service in violation of this article from and after the date that is 45 days after the date on which the notice of violation was given. In addition, the offending electric supplier shall reimburse the aggrieved electric supplier for all witness fees, court costs, reasonable attorney fees and other expenses incurred in any litigation to enforce the aggrieved electric supplier's rights under this article. If the violation is not proved, the aggrieved electric supplier shall reimburse the offending electric supplier for all wit-

ness fees, court costs, reasonable attorneys fees and other costs incurred in the litigation. All actions or proceedings for injunction or for damages shall be brought within three years after the offending electric supplier first renders or extends electric service at retail in violation of this article. (Acts 1985, No. 85-645, p. 983, § 8.)

**§ 37-14-38. Validation procedure; authorization for validation of provisions of article.**

In order to foster and encourage the underlying policies of this article and to assure that sales and purchases of distribution facilities, and other transactions and actions authorized or allowed by this article may be conducted in good faith with a knowledge of the validity of the provisions hereof, and further, to assure that irrevocable commitments are not made in the implementation of the provisions of this article without the assurance of their legality and validity, the following judicial review process is hereby authorized and it is declared to be the legislative intent that the provisions of this statute be judicially reviewed and validated pursuant to the procedure set forth herein and that the circuit court enter a judgment in accordance with the procedure set forth herein.

(1) FILING OF COMPLAINT FOR DETERMINATION AS TO LEGALITY OF PROVISIONS OF ARTICLE.—At any time subsequent to May 20, 1985, an affected secondary electric supplier whose distribution facilities are subject to the provisions of this article and whose facilities may be purchased pursuant to this article by a primary electric supplier may, in its discretion before the closing of such purchase, seek judicial determination of the legality and validity of the provisions of this article. Such complaint shall be filed in the Circuit Court of Montgomery County, Alabama which shall have exclusive venue for the determination of all questions of the legality and validity of the provisions of this article. The filing of any complaint for validation shall stay the dates established

for the closing of all sales of facilities pursuant to the provisions of this article until, with respect to each situation in which intent to exercise the option to purchase has been or is thereafter announced, a date is established by the mutual agreement of the affected primary and secondary electric supplier, which date shall not be in excess of 90 days after the final resolution of the action to determine the legality and validity of the provisions of this article, including any appeal therefrom. It is the intention of the legislature that implementation of the provisions set forth in this article shall not be stayed, other than as set forth above, during the pendency of any such litigation because of the need to eliminate, as soon as possible, duplication of electric distribution facilities.

(2) CONTENTS OF COMPLAINT; ORDER AND NOTICE OF HEARING TO SHOW CAUSE.

a. The complaint by appropriate allegations, references and/or exhibits shall briefly state the following: The authority for the purchase and sale of distribution facilities and other transactions and restrictions under this article; the nature of any municipal franchise which will be affected; a general description of restrictions imposed by this article; and the impact which such restrictions and sale shall have on the parties and the public.

b. The judge of said court shall, upon the filing and presentation of said complaint, issue an order against the citizens of the state, all municipalities and governmental units and other defendants requiring them to show cause, at a time and place to be designated in said order, which time shall be not less than 35 days nor more than 56 days after the issuance of such order, and which place shall be within Mont-

gomery County, why said purchase and sales and the other transactions and restrictions and all other proceedings under this article should not be validated and confirmed. Notice of such order shall be given in accordance with c, d and e below.

c. The Attorney General of the State of Alabama shall be the designated representative of the citizens of the State of Alabama and shall appear on their behalf for all purposes in any proceeding brought pursuant to this section.

d. Prior to the hearing of said cause, the clerk of said court shall publish, in a newspaper of general circulation published in Montgomery County, once each week for at least three weeks before the hearing, the first publication which would be at least 21 days before such hearing, a notice addressed to the citizens of the State of Alabama and all municipalities and governmental units requiring them, at the time and place specified in the order providing for the hearing of such case, to show cause, if any there be, why said purchase and sale or other transaction and restriction that may be referred to in the complaint should not be validated and confirmed. In addition, the clerk of said court shall also publish notice to the citizens of the state and all municipalities and governmental units in newspapers of general circulation customarily published not less often than five days during each calendar week in the Cities of Andalusia, Birmingham, Dothan, Florence, Gadsden, Huntsville, Mobile, Selma and Tuscaloosa. By the publication of such notice, all citizens of the state, all municipalities and governmental units shall become parties defendant to such proceedings, and the court shall have jurisdiction of them the same as if each of them were named individually

as party defendants in said complaint and personally served with process.

e. In addition to the publication and notice set forth in paragraph d, the clerk of the Circuit Court in Montgomery County shall also cause a summons and complaint to be served upon the Attorney General of the State of Alabama as representative of all citizens of the State of Alabama and upon all other parties named as defendants in the action.

f. The plaintiff shall certify to the court, in writing, with an attached list, that it has mailed a copy, by certified mail, return receipt requested, of the complaint filed in the action to each other electric supplier in the state, as defined in this article. Said notice to said electric suppliers shall inform them of the time and place of the hearing and shall contain a copy of the complaint filed herein. The notice required by this paragraph shall be mailed not less than 21 days prior to the date set for the hearing.

g. Each electric supplier, municipality and governmental unit which receives notice pursuant to the provisions set forth in d, e and f above, or which receives notice in any manner whatsoever of this action, may petition the court, as a matter of right, to intervene in said action and to participate in the hearing provided for in subdivision (3) of this section.

h. The failure of any electric supplier, municipality and/or governmental unit having actual or constructive notice of the proceeding to exercise the right to intervene and participate in the hearing shall be deemed a waiver of any right such electric supplier, municipality

or governmental unit may have to participate and to challenge, contest or otherwise question the validity of the provisions of this article.

(3) HEARING AND ENTRY OF JUDGMENT; APPEALS FROM JUDGMENT OF CIRCUIT COURT.—At the time and place designated in said order, the judge of said circuit court shall proceed to hear and determine all questions of law and of fact in said civil action, and he shall make such order, or orders, as to the proceedings in said civil action as will best preserve and protect the interests of all parties and to enable him to enter a final judgment with the least possible delay. The final judgment shall find the facts specially and shall state separately the judge's conclusions with regard to any and all legal issues raised with regard to the legality and validity of the provisions of this article and shall state the judge's conclusions of law thereon. Any citizen of the state may appear in such proceedings, either personally or by attorney, and any party thereto, whether plaintiff, defendant or intervenor, dissatisfied with the judgment of the court may appeal therefrom to the Supreme Court of Alabama in accordance with the Alabama Rules of Appellate Procedure. Such appeal shall take priority in the supreme court over all other cases therein pending, except petitions for writ of habeas corpus.

(4) WHEN JUDGMENT OF CIRCUIT COURT FINAL AND CONCLUSIVE AS TO VALIDITY OF PURCHASE, SALE AND OTHER TRANSACTIONS OR RESTRICTIONS UNDER ARTICLE.—If the circuit court shall enter a judgment validating the provisions of this article and no appeal shall be taken within the time prescribed within the Alabama Rules of Appellate Procedure; or, if an appeal is taken and the judgment validating the provisions of this article shall be affirmed by the Supreme Court; or, if the circuit court shall render

a judgment refusing to validate the provisions of this article, and on appeal such judgment shall be reversed by the Supreme Court (in which case the supreme court shall issue its mandate to the circuit court requiring it to enter a judgment validating the provisions of this article), the judgment of the circuit court validating the provisions of this article shall be forever conclusive against all citizens of the state, electric suppliers, municipalities and other governmental units having actual or constructive notice of the proceedings as to the validity of the provisions of this article.

(5) COSTS OF PROCEEDINGS.—The court costs in any proceeding brought under this article shall be paid by the electric supplier commencing the action.

(6) ARTICLE NOT APPLICABLE WHERE THE VALIDITY OF PURCHASE, SALE OR OTHER TRANSACTION IS IN CONTROVERSY IN PENDING ACTIONS OR PROCEEDINGS.—No action shall be commenced challenging the legality or validity of the provisions of the article, or the legality or validity of a purchase and sale transaction or restriction under this article where the legality or validity of the article is in controversy in any prior pending civil action or proceeding in any court or has been determined in any such action. In the event any action is pending in any circuit in the state which raises or challenges the legality or validity of any provision of this article at the time an action is filed under this section, such pending action shall be transferred to the Circuit Court of Montgomery County and shall be consolidated with the action filed pursuant to this section and the consolidated proceeding shall be adjudicated in accordance with the procedures set forth in this article. (Acts 1985, No. 85-645, p. 983, § 9.)

**§ 37-14-39. Effect of any ruling of invalidity.**

If any part of Section 37-14-32, Section 37-14-33 or Section 37-14-36 of this article is declared invalid under the constitution or laws of this state, including invalidity as a result of impairing unconstitutionally the obligations of a municipal franchise, such declaration shall render invalid all parts which remain; provided, however, that any ruling that the provisions of this article impair unconstitutionally the obligations of any contract other than a municipal franchise shall not render invalid the application of the article in all instances not covered by such contract. Notwithstanding such invalidity, action taken by any party in conformity with the provisions of this article shall be considered lawful actions by such party; provided, however, any electric service rendered which would have been illegal or unlawful or violative of any contractual provision absent this article shall be terminated and the facilities shall be removed following any determination of the invalidity of this article. In all other respects, the provisions and applications of this article shall be deemed to be severable and a declaration of invildity as to any other part or as to any application thereof to any person or circumstance shall not render invalid the parts or applications which remain. (Acts 1985, No. 85-645, p. 983, § 10.)

**§ 37-14-40. Repealer; actions taken pursuant to inconsistent provisions.**

Except as provided in this section, all laws or parts of laws in conflict with the provisions of this article are hereby repealed. In the event, as a result of a final adjudication in Dixie Electric Cooperative, et al. vs. The Citizens of the State of Alabama, et al., Civil Action No. CV 84-V-891-N, it is determined that Act No. 84-206 of teh Alabama Legislature, Regular Session, was valid and constitutional, such Act No. 84-206 shall remain in effect. The principles of this article which are inconsistent with

the provisions of Act No. 84-206 shall no longer be effective with the following exceptions;

(1) The agreement adopted as being in the public interest which is listed in Item 11 of Section 37-14-36.

(2) The agreement adopted as being in the public interest which is listed in Item 12 of Section 37-14-36.

(3) The agreement adopted as being in the public interest which is listed as Item 13 of Section 37-14-36.

(4) The agreement adopted as being in the public interest which is listed as Item 14 of Section 37-14-36.

To the extent actions are taken pursuant to this article which are inconsistent with actions required to be taken under Act No. 84-206, the actions taken hereunder shall be considered lawful. In the event Act No. 84-206 is declared to be valid and constitutional, the time periods for purchase of facilities set forth in Section 37-14-4 shall be extended to occur within nine months from the date of final adjudication of validity. (Acts 1985, No. 85-645, p. 983, § 11.)

## APPENDIX J

## SERVICE AREA AGREEMENT

AGREEMENT

between

THE CITY OF TARRANT CITY, ALABAMA

and

ALABAMA POWER COMPANY

THIS AGREEMENT, made and entered into as of the 8th day of June, 1983, by and between THE CITY OF TARRANT CITY, ALABAMA, (hereinafter called "The City" or "Tarrant City"), a corporation duly created, organized, and existing under and by virtue of the laws of the State of Alabama, and ALABAMA POWER COMPANY (hereinafter called "Company"), a corporation duly created, organized, and existing under and by virtue of the laws of the State of Alabama.

WITNESSETH

WHEREAS, The City and the Tennessee Valley Authority ("TVA") are parties to a power contract dated October 1, 1980, under which electric power and energy are supplied by TVA at wholesale and purchased by The City for resale at retail to electric consumers located primarily within the present corporate boundaries of the City of Tarrant City, Alabama with such areas in Tarrant City being shown in yellow and green colors on the map attached hereto as Exhibit 1; and

WHEREAS, Company also sells electric power and energy at retail to consumers located within and outside said corporate boundaries of Tarrant City; and

WHEREAS, the parties hereto recognize that the operation of electric facilities of the Company and The City serving residential, commercial, and industrial consumers within the same areas has resulted in wasteful

and undesirable duplication of facilities which is not in the public interest; and

WHEREAS, it is the desire of the Company and The City to eliminate to the fullest extent possible any occasion for disputes in the future, and to eliminate to the fullest extent possible consistent with the public interest duplication of Company's and The City's facilities with corresponding preservation of and improvement in esthetic and environmental values and improvement in electric service reliability; and

WHEREAS, it is desirable in the interest of electric system planning to stabilize the areas and customers or potential customers for which the respective parties hereto have the responsibility to provide electric service; and

WHEREAS, upon consummation and implementation of this agreement and contracts growing therefrom, the areas involved shall be assured of more reliable and efficient electric service, with less encroachment of electric facilities upon the environmental and esthetic values; and also without unnecessarily burdening any of the parties hereto with excessive costs resulting from duplicate facilities, which wasteful costs are in the long run paid by the electric consumer; and

WHEREAS, the principles set forth herein have been determined to be consistent with the principles of the Tennessee Valley Authority Act of 1933;

NOW, THEREFORE, in consideration of the mutual covenants and agreements hereinafter contained, the parties hereto mutually agree as follows:

1. The parties hereto recognize that the maintenance of dual service and the duplication of electric facilities in the Tarrant City, Alabama area have resulted in uneconomic operating arrangements and wasteful duplication of facilities which lessen esthetic and environmental values and which can best be eliminated by the parties conducting their electric system operations in accordance with

arrangements as described in this Section. The general principles set forth in this Section 1 shall be implemented in the manner set forth in greater detail in the other sections of this agreement, and in the other contracts to be executed between the parties pursuant to this agreement, all of which are intended to maximize electric service reliability.

a. The City will distribute electricity to (a) all residential customers within the corporate limits of Tarrant City, Alabama, as the same now exists (as shown in yellow and green colors on the map marked Exhibit 1 hereto); (b) to all non-residential customers within such areas except as specified in Section 6; and (c) to that premises outside such present city limits which The City is permitted to serve hereunder, namely, the premises of Citadel Cement Company (including any successor company or companies that buys, leases, or operates on the property now known as the Citadel Cement Company Property). Except to the extent permitted by Section 4, in no event shall The City distribute electricity purchased from TVA or others or generated by The City to any consumers located outside the areas shown in yellow and green colors on the map marked Exhibit 1 attached hereto and made a part hereof. To the extent and in the manner specified in Section 4, The City shall be entitled to extend its service within the area colored brown after such area is annexed hereafter by Tarrant City.

b. Company will discontinue the distribution of electricity within the present corporate limits of Tarrant City, Alabama, being the areas shown in yellow and green on Exhibit 1, being also labeled Areas A and B, at a date when Company has completed its inventory or evaluation of Company's electric facilities located therein and has made satisfactory arrangements for the disposal of such facilities as hereinafter provided, except Company shall (a) continue to supply electric service to those present and future non-residential customers specified in

Section 6 hereof located within such Areas A and B, and (b) continue to maintain transmission and distribution facilities through Areas A and B necessary to provide electric service to customers in other areas outside the city limits. At such time as Tarrant City shall annex any of the area colored brown on the map attached as Exhibit 1, Company shall discontinue distribution of electricity in such area in the manner and to the extent specified in Section 4.

2. *Future Electric Service Within Present Corporate Limits in Area Designated as "Area A."*

a. Inside the city limits of Tarrant City, within the area referred to herein as "Area A" which is shown in yellow on Exhibit 1, The City and Company presently operate competing electric distribution systems, but hereafter The City shall serve all existing and future electric consumers located in Area A, except certain non-residential customers specified in Section 6 below.

b. Within twelve (12) months from the effective date of this agreement, or as soon as practical thereafter, Company shall dismantle and remove all of its existing electric facilities serving consumers within Area A except (1) house power units, (2) facilities for service to non-residential customers which Company is to continue to serve, as provided in Section 6, (3) facilities for electric service to Company operations, and (4) facilities necessary for Company's use in maintaining service to Company's consumers in adjacent areas outside Area A. Company shall have the right to construct new facilities in Area A which are necessary to serve existing or new non-residential customers which Company is to serve as provided in Section 6, and to tie together its system. The City and Company shall within three (3) months from the effective date of this agreement jointly conduct an inspection of Company's facilities to be dismantled and removed and The City shall have an option to purchase all or any part of such facilities at the Company's repro-

duction cost less depreciation as of the date of purchase, provided that The City exercises its option within ninety (90) days following completion of such inspection, and Company shall forthwith inventory such facilities as to which The City has exercised its option, and shall promptly close the sale thereof. The City shall within thirty (30) days from the date hereof assume all obligations of Company to owners or occupants of premises in which house power units are installed.

3. *Future Electric Service Within Present Corporate Limits in Area Designated as "Area B."*

a. Inside the city limits of Tarrant City, in the area referred to herein as "Area B," which area is shown by green color on Exhibit 1, and which encompasses all areas outside Area A now located within the corporate limits of Tarrant City, The City and Company presently operate competing electric distribution systems, but hereafter The City shall, within twelve (12) months from the effective date hereof, and after purchasing Company's facilities therein as hereinafter provided in Subparagraph 3(b), assume responsibility for electric service to all existing and future consumers located in Area B, except certain non-residential customers as provided in Section 6.

b. Promptly after the effective date hereof, Company shall prepare an inventory and an evaluation of its electric facilities located within Area B (and a copy thereof will be furnished to The City for verification) and promptly thereafter The City shall purchase and Company shall sell such electric facilities for a price equal to Company's reproduction cost less depreciation of such facilities plus severance damages of $1,429,233.00. The City shall pay the Company the amount due for reproduction less depreciation for the facilities to be conveyed together with the severance damages at the date of closing. Electric facilities to be covered shall include all of Company's facilities in Area B, including installed house power units, except (a) those facilities necessary

for Company's use in serving those non-residential customers which Company is to continue to serve pursuant to Section 6; or (b) necessary for Company's use in maintaining service to Company's consumers in adjacent areas outside Area B. Company shall have the right to construct new facilities in Area B which are necessary to serve existing or new non-residential customers which Company is to serve as provided in Section 6, and to tie together its system. The City shall assume all obligations of Company to owners or occupants or premises in which the house power units are installed. As of the effective date of such transfer, The City shall serve all consumers in Area B except for those non-residential consumers which shall be served as provided in Section 6.

4. *Future Electric Service in Areas Annexed by City in Future, Presently Located Outside Present City Corporate Limits, But Located Within Area Designated as "Area C" on Exhibit 1.*

Company presently provides the electric service to all customers in the area designated as "Area C," which is shown in brown color on Exhibit 1. In Area C, Company shall continue to provide such service until the area or portions of such area are from time to time annexed by Tarrant City. The City shall, in any portion of the Area C annexed, within twelve (12) months of any such annexation, take over service to customers within such newly annexed portion of Area C on the same basis and to the same extent, and under the same arrangements, which respect to sale of facilities, as provided for in Section 3 hereof concerning Area B, except that in the annexed portions of Area C, The City shall compensate Company for its electrical facilities by paying reproduction costs less depreciation plus an amount for severance damages equal to two years' revenue from the customers served by such facilities (which said sum shall be twice the gross revenue received from such customers during the 12-month period preceding the sale of such facilities),

and any adjustment or rearrangement costs resulting from the sale of a portion of the Company's facilities. Severance damages shall be payable, at the option of The City, (i) in ten (10) equal annual installments beginning on the closing date, or (ii) a lump sum at the date of closing in which event the present worth of the severance damages otherwise payable in accordance with 4(i) above shall be determined using conventional present worth calculation techniques and a present worth (discount) factor equal to the then current yield on U. S. Treasury obligations having a maturity (or remaining maturity) of approximately ten (10) years from the closing date. Company shall continue to serve any portion of Area C which is not annexed. Should The City fail to exercise its right to acquire the facilities within such annexed area within such twelve (12) month period, the Company shall continue to maintain such facilities in such area and The City shall not extend its facilities for electric service into such area. Company shall also maintain facilities to serve those non-residential customers in the area which Company is to serve in accordance with Section 6.

5. *Future Electric Service in Area Outside Tarrant City Corporate Boundaries and Located Outside Dashed Colored Areas on Exibit 1.*

The City shall not provide service from power obtained from TVA or others or generated by The City to any customers located in areas outside the areas colored in yellow, green and brown on Exhibit 1 (except the Citadel Cement Corporation plant, or its successors as provided in Section 1 hereof), whether or not such areas are annexed into and made a part of Tarrant City.

6. *Service to Certain Non-Residential Customers in Areas A, B and C.*

It is recognized by the parties that with respect to certain non-residential customers which are presently located within Areas A, B, and C, and certain of such

customers which may hereafter be located in such area, service by Company shall continue (or shall be permitted) since such service will not involve duplication of facilities. Thus, while Company shall terminate electric service to customers with Areas A, B, and C at the times and in the manner specified in Sections 2, 3, and 4 above, it shall, nevertheless, continue to provide service to those non-residential customers in such areas as specified below.

a. Within Areas A and B (and after annexation to Tarrant City, within Area C) Company shall continue to provide services to a premises where (i) an existing customer of the Company has an electric load of 800 kilowatts or greater, or (ii) where a customer is served from a substation or step-down transformer from 44 kilovolts or higher, which substation or transformer is devoted exclusively to service to a particular premises.

b. Within Areas A and B (and within Areas C after annexation to Tarrant City), non-residential customers at premises which are adjacent to the right-of-way of the Tarrant-Pinson Highway (as designated on the map attached hereto as Exhibit 1) from the intersection of such Highway with the Tarrant-Huffman Road northeast, shall have the right individually to elect whether electric service shall be rendered by Company or The City. Such election shall be made by existing customers within twelve (12) months after the effective date of this Agreement, or in the case of customers in Area C, within six (6) months after annexation to The City. New customers shall make such election at the time service is first rendered to the premises. Once election is made, neither party shall render service to such a premises served by the other.

c. Except for service provided by Company pursuant to subparagraph b above, The City shall provide service to all new customers locating within Areas A and B (and within Area C after annexation thereof to Tarrant City) which have an initial contract demand of less than 5,000 kw; provided, however, if The City and Company mutually agree, upon request for such agreement by the

customer, that service by Company could be provided in a manner which minimizes the potential for duplication of electric facilities, then service to such customer shall be provided by Company.

d. Any new customers locating in Areas A, B, and C having an initial contract demand of 5,000 kw or more shall be served by Company. With respect to any customer in such areas whose initial contract demand is not 5,000 kw or more and who is served by The City, but whose contract demand, or actual monthly demand when all meters serving the contiguous facilities to such customers are totaled, equals 5,000 kw or more for six (6) consecutive months, such customer shall be transferred to, and shall be served by, Company, such transfer to take place within three (3) months after the last day of the sixth (6th) consecutive month in which the demand exceeds 5,000 kw. The City and Company shall make such arrangements as may be necessary to accomplish the transfer of any such customer and cooperate in every way in making arrangements to facilitate a change in service. The City agrees to include provisions for such transfer in electric service contracts with all of its non-residential customers whose demands can possibly exceed 5,000 kw during the term of such contract. At the time of transfer of any such customer to Company, Company shall purchase from the The City all electric facilities which The City used in supplying service to such customer which are not useful on the remainder of The City's system. Company shall pay The City reproduction cost less depreciation for any facilities so purchased, plus severance damages of an amount equal to two years' revenue from each customer transferred and any adjustment or rearrangement costs resulting from such transfer. Severance damages shall be payable, at the option of the Company, (i) in ten (10) equal annual installments beginning on the closing date, or (ii) a lump sum payable at closing, in which event the present worth of the severance damages otherwise payable in accordance with 6(d)(i) above shall be determined using conventional

present worth calculation techniques and a present worth (discount) factor equal to the then current yield on U.S. Treasury obligations having a maturity (or remaining maturity) of approximately ten (10) years from the closing date.

7. *Franchise Rights of Company*: Company's franchise with Tarrant City shall remain in full force and effect; provided, however, that Company shall not exercise its rights under said franchise in a manner inconsistent with this agreement.

8. *Effective Date—Approvals*: This contract, although executed by all parties hereto, shall not be effective until (a) this agreement is sanctioned by the Legislature of the State of Alabama as being in the public interest; (b) all approval necessary from state and federal regulatory bodies has been obtained; and (c) agreement or acknowledgment of TVA has been obtained that this agreement is consistent with the provisions of the Tennessee Valley Authority Act and its power supply contract with Tarrant City. The parties shall use all diligence and us its best efforts to obtain such sanctions and approvals at the earliest possible date.

9. *Schedules*: Numerous dates appear herein, and the parties agree to adjust such dates in the future as appropriate to fit the necessary time schedule as may develop through no fault of the parties.

IN WITNESS WHEREOF, the parties hereto have caused this agreement to be executed by their duly authorized officers, as of the day and year first above written.

THE CITY OF TARRANT CITY, ALABAMA

ATTEST:

/s/ [Illegible]
City Clerk

By /s/ [Illegible]
Mayor

ATTEST:

ALABAMA POWER COMPANY

/s/ [Illegible]
Secretary

By /s/ [Illegible]
Executive Vice-President

## ACKNOWLEDGMENT OF CERTAIN PROPERTY WITHIN CITY LIMITS OF TARRANT CITY, ALABAMA

THIS DOCUMENT is to acknowledge the present city limits in the E. B. Bibb Addition to Tarrant City as of the date of execution of the Agreement between Tarrant City and Alabama Power Company dated 8th June, 1983.

### WITNESSETH

WHEREAS, Tarrant City and Alabama Power Company have entered into an agreement dated June 8th, 1983, the ("Agreement") including Exhibit 1 thereto being a map of the present city limits and surrounding areas; and

WHEREAS, details of a certain area of the present city limits are not capable of being shown precisely, namely in the area of the E. G. Bibb Addition to Tarranty City; and

WHEREAS, the parties desire to show such details on a separate map to assure ease of administration of the Agreement;

NOW THEREFORE, the parties hereto acknowledge that the map attached hereto as Exhibit A reflects the present city limits in the area which is known as the E. G. Bibb Addition to Tarrant City.

IN WITNESS WHEREOF the parties have caused this acknowledgement to be executed this 8th day of June, 1983.

THE CITY OF TARRANT CITY, ALABAMA

ATTEST:

/s/ [Illegible]
City Clerk

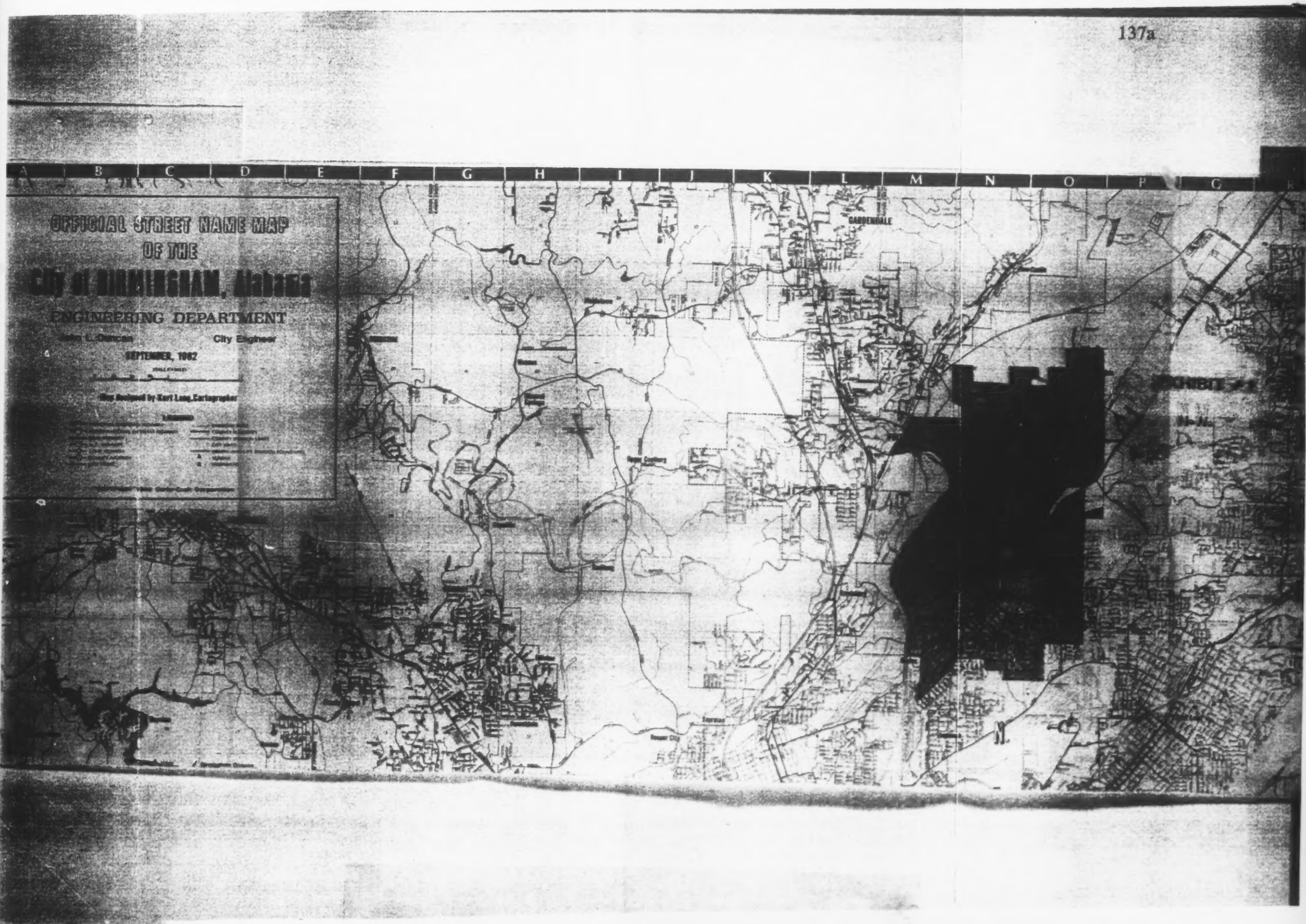
By /s/ [Illegible]
Mayor

ATTEST:

ALABAMA POWER COMPANY

/s/ [Illegible]
Secretary

By /s/ [Illegible]
Executive Vice-President


OFFICIAL STREET NAME MAP
OF THE
City of BIRMINGHAM, Alabama
ENGINEERING DEPARTMENT
John L. Duncan City Engineer
SEPTEMBER, 1962
Map Reviewed by Karl Long, Cartographer
LEGEND
CARDENDALE
EXHIBIT

## APPENDIX K

## EXCERPT FROM AGREEMENT BETWEEN COVINGTON ELECTRIC COOPERATIVE, INC. AND THE CITY OF ELBA AND THE CITY OF ELBA WATER AND ELECTRIC BOARD DATED JANUARY 29, 1985

* * * *

2. *Service Areas and Facilities To Be Sold.*

(a) Covington shall sell and Elba shall buy, in accordance with the purchase terms and provisions of the Act, all of Covington's Distribution Facilities used in serving Existing Premises which such premises are located within the Existing City Limits except for (i) the transmission substation of Alabama Electric Cooperative, Inc., supplying electricity to the Existing Distribution Lines of Covington, (ii) Covington's Existing Distribution Line from said substation generally following Highway 84 West and Covington's Existing Premises (approximately 42) served therefrom extending to the Existing City Limits, (iii) Covington's Existing Distribution Line from said substation generally running Northwest from the substation to the Taylor Mill Road, then Northeast from Taylor Mill Road to the Elba-Brantley Highway, and East to the Elba-Troy Highway and the Elba-Victoria Highway, and that portion of line where the existing three phase crosses the Elba-Brantley Highway North to the Existing City Limits, and Covington's Existing Premises (approximately 16) served therefrom extending to the Existing City Limits, and (iv) Covington's Existing Distribution Line generally following Coffee County Road 42, and generally known as the Packing House Road, and Covington's Existing Premises (approximately 3) served therefrom.

(b) Covington shall have the right and duty to serve the Existing Premises it retains under Section 2(a) hereof and New Premises that are within two hundred and fifty (250) feet of the Existing Distribution Lines retained by Covington under Section 2(a) and which such New

Premises are also closer to such Existing Distribution Lines than to the Existing Distribution Lines of Elba; provided, however, that with respect to Covington's retained Existing Distribution Line which extends from Highland Avenue toward the Elba-Brantley Highway, for that specific portion of said line which traverses the Roland Powell subdivision, a distance of approximately two thousand two hundred (2,200) feet, Covington shall have the right and duty to serve the Existing Premises it retains under Section 2(a) hereof, and New Premises that are within two hunded (200) feet of the Existing Distribution Line, and which New Premises are also closer to such Existing Distribution Line than to the Existing Distribution Lines of Elba.

(c) Except as provided above, Alba shall have the exclusive right and duty to serve all New Premises inside the Existing City Limits of Elba.

(d) Elba shall sell and Covington shall buy, in accordance with the purchase terms and provisions of the Act, all of Elba's Distribution Facilities used in serving Existing Premises which such premises are located outside the Existing City Limits except for Elba's Existing Distribution Line generally following the Elba-Kinston Highway, and Elba's Existing Premises (approximately 37) served therefrom.

(e) Elba shall have the right and duty to serve the Existing Premises it retains under Section 2(d) hereof and New Premises that are within five hundred feet of Existing Distribution Lines and which such New Premises are also closer to such Existing Distribution lines than to the Existing Distribution Lines of Covington.

(f) Elba shall have the right and duty to serve New Premises located in the following described area: A parcel of land in the SE ¼ of the NE ¼, Section 21, Township 5, Range 20, lying North of the Seaboard Coast Line Railroad and beginning at the intersection of the East line of Section 21 and the North line of the Seaboard Coast

Line Railroad; thence running Northwesterly along said railroad 1,385 feet, thence running North 345 feet, thence running East 1,317 feet, thence running South 230 feet to point of beginning, containing 17 acres more or less; also, a parcel of land in the SW 1/4 of the NW 1/4, Section 22, Township 5, Range 20, lying North of the Seaboard Coast Line Railroad, containing 30 acres, more or less. The total acreage in both of the above described parcels being 47 acres more or less and being located in and a part of Coffee County, Alabama.

(g) Except as provided above, Covington shall have the exclusive right and duty to serve all New Premises outside the Existing City Limits.

(h) Existing Distribution Lines purchased pursuant to this Agreement shall, in the determination of service rights, be deemed to be owned by the purchaser, and not by the seller, on and after January 1, 1993.

* * * *

## APPENDIX L

## EXCERPT FROM AGREEMENT BETWEEN SOUTHERN PINE ELECTRIC COOPERATIVE AND ALABAMA POWER COMPANY DATED JANUARY 18, 1985

* * * *

1. The parties hereto recognize that the maintenance of dual service and the duplication of electric facilities in the City of Brewton and the City of Flomaton, Alabama would result in uneconomic operating arrangements and wasteful duplication of facilities which lessen aesthetic and environmental values and which can best be eliminated by the parties conducting their electric system operations in accordance with arrangements as described in this section.

(a) In and around the City of Brewton:

(i) Southern Pine shall continue to provide retail service to all premises presently being served from the existing primary distribution lines of Southern Pine in Areas 1, 2 and 3 as shown in yellow on the map of the City of Brewton attached hereto as Exhibit A as well as service to all new premises in such Areas 1, 2 and 3 which can be served from such existing primary distribution line without extension thereof.

(ii) Notwithstanding any other rights to the contrary, Company shall not extend service to any of the premises within the City of Brewton which Southern Pine is entitled to serve pursuant to the provisions of subparagraph 1(a)(i) above. After the passage of legislation relating to the areas in which electric suppliers are to serve ("Area Legislation") Company shall purchase from Southern Pine and Southern Pine shall sell to Company all facilities of Southern Pine which are used for service to premises other than those designated to be served by Southern Pine in subparagraph 1(a)(i) above, except those facilities which Southern Pine shall maintain for provison of service in other areas. Such sale and purchase shall be conducted in accordance with the provision of the Area Legislation.

(iii) Outside the present City Limits of Brewton, notwithstanding the provisions of the Area Legislation, Company shall be entitled to extend retail electric service to all new premises (*i.e.*, premises not presently receiving electric service) in the areas described below, and Southern Pine shall refrain from extension of service to such premises:

(A) Kirkland Road Area: That area bounded on the East by Kirkland Road, on the South by Sowell Road, on the West by the Brewton City Limits and Highway 31 North of such City Limits to Kirkland Road.

(B) Appleton Road Area: That area bounded on the South by Highway 41, on the West by Burnt Corn Creek, on the North by Little Juniper Creek and on the East by Appleton Road to the Brewton City Limits and the City Limits to Highway 41.

(b) In the present City Limits of Flomaton:

(i) Southern Pine shall continue to provide retail electric service to all premises presently being served from the existing primary distribution lines of Southern Pine in Areas 1, 2, 3 and 4 as shown in yellow on the map of certain of Southern Pine's electric distribution facilities in Flomaton which is attached hereto as Exhibit B, as well as all new premises in such Areas which can be served from such existing primary distribution lines without extension thereof.

(ii) Notwithstanding any other rights to the contrary Company shall not extend service to any of the premises within the City of Flomaton which Southern Pine is entitled to serve pursuant to the provisions of subparagraph 1(b)(i) above. After the passage of Area Legislation, Company shall purchase from Southern Pine and Southern Pine shall sell to Company facilities for service to premises in the City of Flomaton other than that designated to be served by Southern Pine in subpara-

graph 1(b)(i) above and except for facilities to be maintained by Southern Pine to provide service to other areas.

(c) The term "Existing primary distribution line" shall mean primary electric distribution line of 7200 volts to ground, or greater, including any replacements or improvements thereto, but not extensions thereof.

* * * *

**APPENDIX M**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DISTRICT

---

Civil Action No. 89-H-519N

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, *et al*,
*Plaintiffs*

v.

ALABAMA POWER COMPANY, *et al*,
*Defendants*

---

AFFIDAVIT OF DR. JOHN W. WILSON

---

I. *Qualifications*

Dr. John W. Wilson, being first duly sworn, deposes and says that:

(1) I, John W. Wilson am an adult resident of Maryland. I am President of J.W. Wilson & Associates, Inc. Our offiees are at 2600 Virginia Avenue, N.W., Washington, D.C. 20037.

(2) I hold a B.S. degree with senior honors and a Masters Degree in Economics from the University of Wisconsin. I have also received a Ph.D. in Economics from Cornell University. My major fields of study were industrial organization and public regulation of business, and my doctoral dissertation was a study of the price elasticity of demand for electric power.

(3) After completing my graduate education I served as a Captain in the U.S. Army and as an assistant professor of economics at the United States Military Acad-

emy, West Point, New York. In that capacity, I taught various courses in economics at the introductory and intermediate levels. While at West Point, I also served as an economic consultant to the Antitrust Division of the United States Justice Department.

(4) After leaving West Point, I was employed by the United States Federal Power Commission (FPC), first as a staff economist and then as Chief of FPC's Division of Economic Studies. In that capacity, I was responsible for a wide range of regulatory matters involving most phases of FPC regulation of electric utilities and the natural gas industry. Since 1973 I have been employed as an economic consultant by various clients including federal, state and local governments, private enterprise and nonprofit organizations. This work has pertained to issues concerning public utility regulation, antitrust matters and economic and financial analysis.

(5) I have authored a variety of articles and monographs, including a number of studies dealing with competition in the electric utility industry, the price elasticity of demand for electric power, utility ratemaking, the regulation of public utilities and studies dealing with the economic structure and performance of competitive markets. I have consulted on regulatory matters with the Antitrust Division of the United States Department of Justice, the Bureau of Competition of the Federal Trade Commission, the National Academy of Sciences, the Ford Foundation, the National Regulatory Research Institute, (which is the research arm of the National Association of Regulatory Utility Commissioners), the Electric Power Research Institute, (which is the jointly supported research arm of most major electric utilities in the U.S., including utilities such as the defendants in this case), the U.S. Commerce Department, the U.S. Department of the Interior, the Federal Communications Commission, the U.S. Department of Energy, the Small Business Administration, the Department of Defense, the Tennessee Valley Authority, the

Federal Energy Administration, and numerous state and provincial agencies and legislative bodies in the United States and Canada. I was a member of the Economics Committee of the U.S. Water Resources Council, and I was the FPC Coordinating Representative for the Task Force on Future Financial Requirements for the National Power Survey.

(6) I have testified as an expert witness in several court proceedings dealing with competition in the electric power industry and before more than 50 Federal and State regulatory bodies throughout the United States and Canada. I have also appeared on numerous occasions as an expert witness at the invitation of U.S. Senate and Congressional Committees dealing with antitrust and regulatory legislation. In addition, I have been retained as an expert on regulatory matters by more than 25 State and Federal regulatory agencies, including the Alabama Public Service Commission. I have also participated as a speaker, panelist, or moderator in many professional conferences and programs dealing with utility regulation, financial issues, economic policy and antitrust matters. I am a member of the American Economic Association and an Associate member of the American Bar Association and of the ABA's Antitrust and Regulatory Law Sections.

## II. *Questions Addressed*

(7) I have been asked to evaluate whether the Defendants' private agreements included as part of the Territorial Acts (hereinafter sometimes also referred to as the Acts) meet the purpose of the "active supervision" test for state action immunity set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 45 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980) (the *Midcal* test) and explained by the 11th Circuit Court in its remand in this case: "to ensure that private anticompetitve conduct promotes state policy rather than the interests of private parties", (*Municipal Utilities Bd. v.*

*Alabama Power Co.* 934 F.2d 1493 (11th Cir. 1991) at 1503).

(8) I shall proceed by first discussing the private agreements, their origin, their unsupervised ongoing implementation, and the extent to which they are inconsistent with state policy and promote the anticompetitive interests of the private parties that made them to the detriment of other electric utilities in Alabama including the plaintiff Cities, state ratepayers and the public interest. I will then discuss the special importance, from an economic perspective, of active state supervision under circumstances such as those pursuant to the Acts where the disciplinary forces of market competition have apparently been eliminated by the legislative authorization of anticompetitive conduct to promote state policy.

## III. *The Territorial Acts*

(9) The Alabama legislature has passed two statutes that are intended to eliminate allegedly wasteful electric distribution facilities duplication by granting exclusive service territories to certain utilities. These Acts are designed to divide the state into service territories, and they include general provisions for territorial division to meet the statutory goal.

(10) The Eleventh Circuit has approved the Acts as being consistent with a clearly articulated state policy to divide the state into service territories. The Court also approved the general provisions of the Acts as having eliminated "virtually all" discretionary behavior by retail electric service suppliers outside their service territories, so that all actions by suppliers may serve the policy goals of the statute. As such, the general provisions were deemed by the court to pass the active supervision prong of the *Midcal* test.

## IV. *Private Agreements*

(11) But, as the Eleventh Circuit recognized in its remand, the private agreements appended to the Acts go

beyond the general provisions. They include specific privately structured agreements between Alabama Power, certain coops and some municipal electric systems that go beyond the general provision of the Acts so as to impose territorial divisions not contemplated by the Acts and, in some cases, permit ongoing implementation unchecked by active state supervision. These private agreements do not meet the active supervision test of *Midcal.* The purpose of that test has been clearly laid out by the Eleventh Circuit in its remand: "[t]he supervision prong prevents a state from frustrating the national policy in favor of competition by casting a shadow of state involvement over what is essentially private anticompetitive conduct". (at 1501)

(12) The "state policy" that must be promoted by the conduct of parties to the private agreements, goes well beyond the narrow purpose of dividing service territories to limit facilities duplication. Indeed, if territorial division is achieved, as here, in a manner that undermines the public's interest in efficiency and resource cost minimization for the private unsupervised benefit of the Defendants at great cost to the state of Alabama and to all affected customers, it fails the state policy test.

(13) The term "state policy" encompasses the state policy goal of efficient production and distribution of electricity as well as the limitation of facilities duplication. Thus, restricting competition that results in facilities duplication does not convey to the Defendants a blanket authority to fix territorial boundaries to their private liking independent of active state supervision. The supervision test explicitly seeks to prevent private anti-competitive conduct that would serve only the interest of those engaging in it, to the detriment of the public interest in efficiently produced and distributed low cost power.

(14) Certain of the private agreements, nevertheless, provide for ongoing discretion by the Defendants, without

state review, in clear violation of the active supervision standard. For example, paragraph 6 (c) of the agreement between Tarrant City, Alabama and Alabama Power Company, dated June 8, 1983 states:

> "Except for service provided by Company pursuant to subparagraph b above, the City shall provide service to all new customers locating within Areas A and B (and within Area C after annexation thereof to Tarrant City) which have initial contract demand of less than 5,000 kw; provided, however, if the City and Company mutually agree, upon request for such agreement by the customer, that service by the Company could be provided in a manner which minimizes the potential for duplication of electric facilities, then service to such customer shall be provided by Company."

(15) Likewise, the agreement between the City of Evergreen and the Southern Pine Electric Cooperative states in its entirety:

> "WHEREAS, Southern Pine will continue to serve its present customers on its existing lines located within the proposed extension of the city limits, as well as all new customers located along the present existing lines within three hundred feet (300′) from the edge of the right-of-way of street or road, or the lots, or city blocks existing along the lines presently used by Southern Pine Electric Coop, provided however, that any new industry who might locate in these areas shall be negotiated as to who will serve the industry by the Governing Bodies of the City of Evergreen and Southern Pine Electric Co-op [sic]."

(16) Similarly paragraph 4 of the agreement between Cullman Electric Cooperative and The Utilities Board of the City of Cullman states:

> "In the event that either party refuses to make service available to a prospective consumer or consumers in

its service area, the other party may, after submission to it by such prospective consumer or consumers of proof of such refusal to serve, commence serving such consumer or consumers.

. . .

In the event line extensions are constructed by one party in the other party's service area for service to a prospective consumer or consumers in accordance with this section 4, the service area boundary established by this agreement shall be considered automatically revised to include such consumer or consumers in the service area of the party constructing such extensions."

(17) Other private agreements, while not expressly providing for the same degree of ongoing discretion by the parties, were themselves the product of private discretion at the time of their initiation. Some of these private agreements established territorial boundaries that were different than those envisioned under the general provisions of the Act, without reference to any apparent engineering or economic efficiency logic, and representing merely the "bargains" struck by the parties. For example, the agreement between Alabama Power Company and Tallapoose River Electric Cooperative allows the parties, for their own private purposes, to vary the effective date of the boundaries that would have been established by the general provisions of the Act. This effectively modifies the boundaries themselves and violates the active supervision test of *Midcal*.

(18) The agreement between Alabama Power Company and Pea River Electric Cooperative assigns service areas differently from the areas that would have been assigned had Alabama Power simply not exercised its purchase option as provided by the Act. No state scrutiny or supervision of these new agreements was performed.

(19) The agreement among Covington Electric Cooperative, the City of Elba, Alabama, and the City of

Elba Water and Electric Board provides for the City of Elba to serve an area as large as 40 acres outside the city in return for the City's giving up its purchase option on certain of the Cooperatives distribution facilities within the municipal limits of Elba. There is no evidence the legislature scrutinized or supervised this change in service area designations.

(20) The agreement between Alabama Power Company and Southern Pine Electric Cooperative permitted Alabama Power to extend service to two specifically described areas, the Kirkland Road area, and the Appleton Road area, even though these areas were closer to Southern Pine than Alabama Power and Alabama Power would have to extend its lines to serve them. Rather than implementing state policy objectives, the agreement was a trade-off for Alabama Power's waiving its purchase option on the four areas that Southern Pine was permitted to retain in the City of Brewton. There was no state supervision of this trade-off.

(21) In general, the ways in which the parties to the private agreements have anticompetitively violated the active supervision prong of the *Midcal* test can be summarized as follows:

- Alabama Power, certain cooperatives and some municipal electric systems reached agreements with each other and divided service areas among themselves without the majority of Plaintiff Cities' participation and without reference to customer concerns, either directly or through regulatory oversight.

- The private agreements were made part of the statute without active evaluation or review. There is no record of a discussion of these agreements in open session of either legislative house or of their being referred to any committee for review. This is a clear and direct violation of the simple meaning of the active supervision test under *Midcal*.

- The general provisions of the Acts provide for territorial divisions, but the private agreements go beyond those provisions and allow Alabama Power to serve customers it would not otherwise serve. Such a division of customers, without Cities' or customer participation, and without state review is an unwarranted extension of the general provisions of the Acts.

- Some of the private agreements allow Alabama Power and the coops ongoing discretion to decide among themselves who will serve new customers, without state supervision or the possibility of Cities' or customer participation.

V. *Competition in the Electric Utility Industry*

(22) As discussed below, the electric utility industry, despite its regulated nature, typically embodies important and powerful types of market competition that help to spur efficiency and further the public interest. In circumstances such as those that apparently exist in this case, where competitive forces have been constrained as determined by the legislature to be in the public interest, active state supervision is essential in order to prevent the private exploitation of the constrained markets. The following forms of competition generally exist in electric utility markets and must be replaced with active state supervision when, as here, they are eliminated:

- *Direct price competition to serve a customer or group of customers.* This type of competition may be virtually continuous with sales agreements covering short durations (e.g., for one hour in a spot market) or it may involve long term transactions that last for 20 or more years. Competition between utilities to attract or retain industrial loads in their service territories is a distinct and important form of direct price competition. This type of competition, where it exists, motivates rival utili-

ties to improve service and reduce costs in order to achieve market growth.

- "*Fringe*" *competition to serve (often new) customers around the borders of franchises.*
- "*Franchise*" *competition for an exclusive right to serve a group of customers.* Typically franchises are granted for a significant time period, often between 20 and 30 years. Those utilities that are most efficient and successful in reducing costs stand the best change of renewing and expanding their franchised service areas. The apparent perpetual nature of franchise rights in Alabama pursuant to the Territorial Acts greatly weakens these normal performance incentives thus resulting in considerably greater reliance on active state supervision to assure economic efficiency.
- "*Yardstock*" *competition, in which the performance of one company can be affected by the example of another, either directly or because of regulatory comparisons for ratemaking purposes.* Yardstick competition is most often thought of in terms of a comparison between the performance of investor owned utilities and publicly owned systems, because publicly owned systems are the major alternative to investor owned utilities.

(23) These kinds of competition are not entirely separate phenomenon. For example, the impact of yardstick competition is strengthened considerably when combined with competition for franchises.

## VI. *Harmful Effects on the Cities*

(24) The limits on service area growth imposed by the agreements injure the Cities in several ways. The loss of potential customer growth areas reduces the utility revenue stream Cities can expect to receive over time. This can lead to a "death spiral" effect by requiring existing customers to pay a greater share of capacity costs, causing

additional movement out of a city's service area, loss of revenues for other public purposes and further raising costs to remaining customers.

(25) Lack of growth possibilities can also cause Cities and municipal power authorities to forego economies of scale by building smaller than optimally sized units at a time when the Cities may otherwise be able to build efficient units and market the temporary excess (targeted for future customer growth) to others and use the revenue to reduce its current rates.

(26) Moreover, denying municipals the opportunity to serve new areas, threatens the viability of municipals as healthy competitors to other Alabama utilities. For example, because future territorial annexation by municipalities would result in a dichotomy between those citizens who qualify for municipal utility service (because they were "grandfathered" in when the Territorial Acts were passed) and those who do not (i.e., customers in newly annexed areas), such denial may impair municipal growth or (if growth occurs) result in political dissatisfaction with a public service that is available only to some citizens.

VII. *The Value of Competition in Regulated Industries*

(27) When it is unimpaired, franchise competition can discipline utility company actions in powerfully beneficial ways. To survive, let alone prosper, firms must continually find ways to lower costs and prices. If they don't, their competitors will and their franchise may be in jeopardy.

(28) To some degree, sound regulation can serve as an alternative to competition. However, in Alabama the cooperative and municipal systems are not regulated and the private agreements at issue in this case are not subject to any regulatory oversight for any electric suppliers (including Alabama Power) at all. But, even when regulation exists, it can not fully achieve the efficiency incentives provided by competition. This is one reason why federal regulatory policy is moving in the direction of injecting

more competition into electric utility markets. Conversely, the private agreements in this case would serve to reduce the impact of competitive market forces without ongoing active supervision.

(29) Efficiency requires firms to actively seek to continuously reduce costs of service, not just avoid waste. Franchise and yardstick competition provide incentives to seek out lower cost production techniques through improved management efficiency, cost control, and research and development that enhance efficiency over time.

(30) Without the threat of franchise competition, utility managements are free to choose the quiet life removed from the more dynamic quest for product and market improvements. Given the knowledge that their markets are secure and that future growth cannot be inhibited by competitive forces and absent active state supervision, there is little to compel monopoly utilities with exclusive perpetual franchises to develop and introduce new concepts and improvements at the most efficient rate.

(31) The importance of competition as a key factor in regulated industries has long been recognized. For example, in passing the Federal Power Act, the United States Congress created a regulatory system with an eye to preserving and enhancing competition, not replacing it. The initiative for rates is left with private utilities, subject to review and alteration by the Federal Energy Regulatory Commission. The courts have also determined that the Act does not insulate utilities from the antitrust laws, and they have required FERC to look to the policies of those laws in performing its regulatory duties.

(32) In recent years, competitive values have received more explicit endorsement and concrete steps have been taken to rely more on market outcomes. Encouraging competition and relying on competitive market forces where possible to stimulate efficiency and allocate resources is a cornerstone of the National Energy Strategy.

(33) The 11th Circuit Court of Appeals has recognized the important role competition plays in the utility industry. In its remand of this case, the Court spoke of a "national policy in favor of competition" and explained how the very purpose of the active supervision test in *Midcal* was to prevent a state from frustrating that policy "by casting a shadow of State involvement over what is essentially private anticompetitive conduct". (at 1501)

(34) In summary, there is a single indicator for determining whether private agreements pass the active supervision part of the *Midcal* test, i.e., whether they promote the public interest or private interests to the detriment of the public interest. That is, are they likely to cause higher rates (both to customers in the identified service territories and to customers of the Cities), without any corresponding cost or other justification, relative to the general provisions of the statute? In this case it is clear that the private agreements achieve no apparent efficiency and, it is equally clear that they are a private creation unconstrained by active state supervision. As such, the private agreements constitute anticompetitive acts that benefit only the parties to the agreements, while harming the public interest. For this and the other reasons previously stated, the private agreements fail the active supervision test under *Midcal*.

Further affiant saith not.

/s/ John W. Wilson
JOHN W. WILSON

SUBSCRIBED AND SWORN TO BEFORE ME
THIS 26TH DAY OF NOVEMBER 1991

/s/ Margaret R. Wegley
Notary Public

My Commission Expires:
September 14, 1996

[Notary Seal]

Supreme Court, U.S.
FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-956

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## BRIEF OF BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION IN OPPOSITION

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## BRIEF OF BLACK WARRIOR ELECTRIC MEMBERSHIP CORPORATION IN OPPOSITION

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### STATEMENT OF THE CASE

There are certain inaccuracies and omissions in the Statement of the Case presented in Brief of Petitioners (also referred to as Cities), as follows:

(a) At Petitioner's Brief, Pages 3 and 4, it is stated that the private agreements were "exceptions to the general provisions of the Territorial Acts". To characterize the agreements as exceptions is inaccurate, since it is obvious that the agreements are a part of the Territorial Act and are adopted and mandated therein as being in accord with the stated policy of the Legislature in adopting these Acts.

(b) Commencing with Page 5 of Petitioners' Brief, the remainder of Petitioners' "factual background" consists primarily of argument rather than facts.

(c) Likewise, in Petitioners' section entitled "Proceedings Below", commencing at Page 11 of Petitioners' Brief, Petitioners concern themselves primarily with their own contentions and arguments rather than the actions of the lower Courts. For example, Cities in this section (Cities Brief, p. 14), in referring to findings of the Court of Appeals relating to provisions of the incorporated agreements, quoted that Court as recognizing "that their provisions would appear to give the parties the right to allocate new customers without the Legislature's approval' ".

Such a statement is misleading and taken out of context. The full sentence of the Court of Appeals addressing this point (Cities Appendix 5a), is as follows:

> "Standing alone, the provisions we have quoted appear to give the parties the right to allocate new customers without the Legislature's approval. These provisions, however, do not stand alone, as the District Court concluded; they must be read in pari materia with the incorporating provision of the 1985 act, section 37-14-36."

A succinct Statement of the Case would reflect that on July 5, 1991, the United States Court of Appeals for the Eleventh Circuit fully affirmed the decision of the District Court as to the general provisions of the Territorial Acts, finding that the same fulfill both prongs of the *Midcal* test, cited below, and are exempt from the Sherman Act (Cities' Appendix, 46a, 47a and 50a), citing *Fisher v. City of Berkeley,* 475 U.S. 260, 268, 106 S.Ct. 1045, 1050, 89 L.Ed.2d 206 (1986), which quoted *Rice v. Norman Williams Company,* 458 U.S. 654, 665, 102 S.Ct. 3294, 3302, 73 1042 L.Ed.2d (1982). The Eleventh Circuit observed (Cities Appendix 46a) that, unlike the Defendants in *Patrick* or *Midcal,* cited below, the defendants in this litigation do not exercise any private regulatory power. The case was reversed and remanded

to the lower court, however, because the Court of Appeals could not make the same determination regarding the private agreements which were incorporated into the Acts because the terms of the agreements were not contained in the Record. On remand to the District Court, that Court further considered the relation of the private agreements to the Acts, and on March 4, 1992, entered its Memorandum Opinion and Order granting Defendant's Motion to Dismiss (Cities Appendix 9a). Therein, the District Court found that the sole issue was one of law, i.e., whether the terms of the agreements referred to are sufficient to comply with the legal standards set out in *Midcal*; and, reading the agreements in pari materia with the Acts themselves, concluded that the Acts required that modifications of the incorporated agreements be treated as new agreements which cannot become effective without Legislative approval (Cities Appendix 18a and 19a).

On May 23, 1994, upon Cities' third appeal to the Eleventh Circuit, the Court of Appeals affirmed the decision of the District Court dismissing the Cities' case (Cities Appendix 7a and 8a).

## SUMMARY OF ARGUMENT

Plaintiffs lay down three basic reasons why they contend the Writ should be granted. First, they contend the decisions below "directly conflict with a series of Opinions of this Court, citing *FTC v. Ticor Title Insurance Company*, 112 S.Ct. 2169 (1992). This contention is completely without merit, since *Ticor*, like *Midcal*, cited below, was addressing the action of a representative or agency of the State rather than the State itself. Here, by express interpretation of the Act itself, no discretion is left to private persons, agencies or other representatives, only to the sovereign.

Second, Plaintiffs say the District Court relied upon decisions which have been reversed or displaced. This conclusion has no rational basis. *Ticor* was reversed sim-

ply to allow the Court below to reexamine its determination and address whether it accorded proper deference to the Commission's factual findings in relation to State supervision. Here, again, the reference is to proper oversight by the State as to pricing. In the instant case, all oversight is by the Legislature itself.

Third, Plaintiffs merely repeat their conclusion that the State Legislation "clearly" does not satisfy *Ticor* and *Midcal.* Again, this allegation is patently without merit as the Legislation does clearly satisfy *Parker, Hoover* and *Bates,* cited below; and is in no way in conflict with either *Ticor* or *Midcal.*

The Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market except for large industrial customers. The sections of the acts which incorporate the described private agreements state that the Legislature has determined that these agreements are consistent with the general purpose of the acts. The sole purpose of the second prong of the *Midcal* test is to prevent a lack of regulation over any possible private anti-competitive conduct. In the instant case, however, the acts themselves strictly control the assignment of service areas to electric providers, and leave no room for private discretion in the assignment of service areas; and, thus, the question of active supervision, if not moot, is clearly provided in the Acts themselves.

## ARGUMENT

This case presents the question whether the State Action Doctrine of Immunity from actions under the Sherman Act applies to the action of the State Legislature in establishing and implementing procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the State, including areas within present and future corporate limits of municipalities in the State; and in reviewing certain private agreements between electric suppliers and finding that such agreements were not inconsistent with the purposes and policies set forth in its mandated procedures, declaring said agreements to be applicable to the overall policy of the State.

The State Legislative Act is applicable equally to the Plaintiffs and the Respondents, providing to each a territorial playing field to implement its stated purpose. (Cities Appendix 73a and 97a). Indeed, many of the agreements which were found to be applicable to the mandate of the Legislature and to meet the objectives outlined in the State procedures, were entered into between various municipalities in the State of Alabama and some of the Respondents named in this action. Further, one of the Plaintiffs, City of Bessemer, Alabama, was also a party to one of the agreements with Respondent Alabama Power Company and the Tennessee Valley Authority.

It is apparent here that the real party in interest is the State Legislature of the State of Alabama, which as sovereign, not only declares the anti-competitive policy but also actively supervises it (Cities' Appendix, at 116a). To permit these Plaintiffs to look behind the actions of the State sovereign and base their claims on perceived illegal conspiracies among members of the State Legislature and the officials of the State of Alabama would simply emasculate the doctrine in *Parker v. Brown*, cited below. Much consideration has been given by both the District Court and the Eleventh Circuit Court of Appeals to the applica-

tion of the standards laid down in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). However, this Respondent suggests that the action of the State Legislature is the sovereign act of the State itself, and such action by the Legislature, ipso facto, is exempt from the operation of the Anti-Trust laws, without reaching the issues laid down in *Midcal.* (*Hoover v. Ronwin,* 104 S.Ct. 1989 (1984).

Obviously *Hoover* was rendered after *Midcal* and, indeed, certiorari was granted in *Hoover* to review the State action doctrine laid down by the 9th Circuit, reversing a decision of the United States District Court for the District of Arizona, which had dismissed the Plaintiff's action on a FRCP 12(b)(6) motion. Clearly, it was not the intent of this Honorable Court to apply the *Midcal* two-prong test in *Hoover,* thus making it very clear that the principles laid down in *Parker* were still clearly the applicable law, and that a State Legislative Act is simply by its nature exempt from Anti-Trust Law. Moreover, the Ninth Circuit was reversed by this Honorable Court after having taken the position that the Petitioner's might be able to invoke the State Action Doctrine, but reasoned they first must show they were acting pursuant to a "clearly articulated and affirmatively expressed state Policy".

Here, we are not dealing with some activity carried out by regulatory bodies under State authorization; rather, we are dealing solely with the sovereign act of the Legislature itself, restricting the duplication of electric service lines and the supplying of electric service in the State. The Sherman Act has never been construed as prohibiting anti-competitive actions of a State itself, acting through its Legislature (*Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

The *Parker* doctrine was applied in *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d

810 (1977), and, in 1984, it was applied in *Hoover, supra.* This Honorable Court has never departed from the basic reasoning in *Parker,* and there is no basic reason for not applying the *Parker* doctrine in the case presently before it. The record is abundantly clear that all of the issues enumerated by the Plaintiffs in their Petition are merely argumentative or have simply been resolved by this Court in *Parker v. Brown, Hoover v. Ronwin,* and *Bates v. State Bar of Arizona.*

The State Action Doctrine, as laid down in *Parker* is grounded in concepts of Federalism and State sovereignty; and this Court reasoned in *Parker* that "there is no suggestion of a purpose to restrain State action in the (Sherman Acts) Legislative history" (*Parker,* 317 U.S. at 351). As stated above, the conduct which the Plaintiffs complain of is clearly the action of the State itself, not action taken through any regulatory agency, municipality, or private party. *Bates* and *Hoover, supra.*[1] The Eleventh Circuit Court of Appeals went further than the basic *Parker* doctrine and found that the Act itself, as properly interpreted by the District Court, met the two-prong test laid down in *Midcal* (Cities' Appendix, Note 4, at 7a, et seq.). It further found (Cities' Appendix, Note 4, at 7a, et seq.) that the City's effort to require the Court to determine whether the Legislature in incorporating the agreements into the Act by reference exercised sufficient independent judgment and control so that the details of these service area assignments were established as a product of deliberate State intervention, was "so patently meritless as to warrant no discussion", citing *Hoover.*

The two-prong test laid down in *Midcal* was not intended to be applied and never has been applied, to a circumstance where the action was by the sovereign itself,

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[1] Also, see *Community Communications Company v. Boulder,* 455 U.S. 40, 102, S.Ct. 835, 70 L.Ed.2d 810 (1982), wherein Justice Brennan was careful to distinguish between action by the sovereign itself and action taken by a subordinate body.

unless the anti-competitive act is left to the unsupervised discretion of private parties, *Patrick v. Burget,* 486 U.S. 94 at 100. This requirement is designed to insure that the State Action Doctrine will shelter only the particular anti-competitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Patrick, supra* at 101. Thus, we should not even reach the issue of whether *Midcal* applies to the present case, since the supervision is obviously by act of the State Legislature itself, including those acts of private parties previously taken as reflected in the incorporated agreements, and found to be in accord with state policies.

*Hoover* clearly points out that in such cases as *Midcal,* it becomes important to insure that the anti-competitive conduct of the State's representative was contemplated by the State. If the replacing of entirely free competition with some form of regulation or restraint was *not authorized or approved by the State,* then the rationale of *Parker* is inapposite. In other words, where the anti-competitive conduct of a non-sovereign State representative was at issue, the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" (*Boulder*); and has also found in such cases that the degree to which the State Legislature or Supreme Court supervises its representative is relevant to this inquiry (*Midcal*). However, when the conduct is that of the sovereign itself, the danger of unauthorized restraint of trade is not present. In the instant case, any continuing or future acts by parties to the agreements are prohibited by the terms of the Act unless first approved by the State Legislature (Cities' Appendix P. 68a).

Plaintiffs repeatedly seek to characterize legislation as simply authorizing private violation of the Sherman Act. A simple reading of the legislation shows such argument to be not worthy of discussion. The State simply found these agreements to be in line with its stated policy. The

Opinion of the Eleventh Circuit Court of Appeals pointed out that only three of the agreements referred to by Petitioners and incorporated in the Acts were involved in the Appeal, and that the District Court concluded that these agreements must be read in pari materia with the incorporation provision of the 1985 Act, Section 37-14-36, and thus would require Legislative approval before the parties to the agreement could allocate customers between themselves (Cities Appendix, 5a).

## CONCLUSION

For the reasons set out herein, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JAN 26 1995
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No. 94-956

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. May a state legislature, consistent with antitrust law, allocate exclusive territories to suppliers of electricity by enacting legislation that incorporates boundaries previously drawn by private electric suppliers, if its legislation provides that no subsequent agreements between suppliers concerning territorial boundaries will be effective without legislative approval?

2. Where a state legislature acts to limit competition directly, rather than through a subordinate or coordinate agency, must its actions meet an "active supervision" test borrowed from different factual and legal contexts?

3. Where a state legislature acts to limit competition by allocating exclusive territories to suppliers of electricity and incorporates certain boundaries agreed upon by private corporations and by municipal corporations, must the state legislature actively supervise such agreements involving municipal corporations?

## RULE 29.1 STATEMENT REGARDING PARENT COMPANIES AND SUBSIDIARIES

The respondents submitting this Response are as follows:

The Alabama Rural Electric Association of Cooperatives
Alabama Electric Cooperative, Inc.
Dixie Electric Cooperative
Covington Electric Cooperative, Inc.
Marshall-DeKalb Electric Cooperative
Southern Pine Electric Cooperative
Cherokee Electric Cooperative
Cullman Electric Cooperative
Pioneer Electric Cooperative, Inc.
Tombigbee Electric Cooperative, Inc.
Wiregrass Electric Cooperative, Inc.
Joe Wheeler Electric Membership Corporation
Clarke-Washington Electric Membership Corporation
Tallapoosa River Electric Cooperative
Pea River Electric Cooperative
Central Alabama Electric Cooperative
Sand Mountain Electric Cooperative
Franklin Electric Cooperative
North Alabama Electric Cooperative
Baldwin County Electric Membership Corporation
Coosa Valley Electric Cooperative, Inc.
South Alabama Electric Cooperative, Inc.
Arab Electric Cooperative, Inc.

None of these entities has a corporate parent or subsidiary within the meaning of Rule 29.1.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1994

**No. 94-956**

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THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

1. *Factual Background:*

In Alabama, electric service at retail has been provided by four types of electric suppliers: The Tennessee Valley Authority, Alabama Power Company, electric cooperatives formed under Alabama state law,[1] and municipalities that own and operate electric facilities pursuant to legislative authorization.[2] This litigation concerns the decision of the Alabama Legislature to promulgate statutes governing who should provide electric service at retail to a particular customer where two or more suppliers are physically capable of doing so.

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[1] Ala. Code §§ 37-6-1 *et seq.* (1992).

[2] Ala. Code §§ 11-81-140, 11-81-160, 11-81-200 *et seq.* (1991).

In 1984, the Alabama Legislature enacted Act No. 84-206, pertaining to service territories for electric suppliers. 73a-96a. Act No. 84-206, now codified at Sections 37-14-1 through 37-14-17 of the Alabama Code, noted that the Alabama Legislature had investigated the economic, financial and environmental impact associated with duplicate electric distribution facilities, and affirmatively declared the Legislature's conclusion that "the benefit normally associated with competition between two or more entities for customers is outweighed by the tremendous cost burden which must be borne by such customers associated with the maintenance of two or more duplicate sets of facilities." Ala. Code § 37-14-1 (1992) (73a). The Legislature also found that the existence of duplicate facilities for furnishing electricity at retail "is not in the public interest" because of its adverse effect on safety, aesthetics, and the environment. *Id.* The Legislature therefore mandated that the policy of the state of Alabama would be "to ensure effective, economical and orderly supply of electric service . . . and to avoid unnecessary duplication of facilities by electric suppliers which would result in waste and in degradation of the environment." *Id.* Finally, the Alabama Legislature indicated that it was "necessary and in the public interest to establish, mandate and implement procedures for determining which electric supplier shall furnish electric service to customers at retail within various areas of the state." *Id.*

The substantive provisions of Act No. 84-206, the Alabama Legislature's statutory response to the environmental and other considerations noted above, may be summarized as follows:

1. It "freezes", for purposes of the Act, all municipal boundaries at their positions on April 26, 1984. Ala. Code §§ 37-14-2(8), 37-14-3(6) (1992) (75a, 78a);

2. It "freezes", for purposes of the Act, all distribution lines in existence on January 1, 1984. Ala. Code §§ 37-14-2(5), 37-14-3(6) (1992) (75a, 78a);

3. It provides that retail electric service shall be provided by the electric supplier whose distribution lines on January 1, 1984, were closest to the customer, with exceptions for (a) large-load customers and (b) electric suppliers themselves when acting as electrical customers at their premises. Ala. Code § 37-14-3(1) (1992) (76a-77a);

4. It provides for the incorporation of several pre-existing agreements between various adjoining electric suppliers into the overall territorial plan, as those agreements were found by the Alabama Legislature not to be inconsistent with the purposes and policies set forth in the Act. Ala. Code § 37-14-8 (1992) (86a-88a);

5. It provides that subsequent to April 26, 1984, suppliers can enter into mutual agreements regarding nonduplication of lines, but that no such subsequent agreement will be valid "unless and until it has been reviewed and approved by the legislature." Ala. Code § 37-14-8 (88a).

After the passage of Act No. 84-206, a judicial challenge to its overall validity met with initial success in the United States District Court for the Middle District of Alabama.[3] In response to this initial adjudication of invalidity, which did not involve antitrust contentions, the Alabama Legislature passed a substantially similar act, No. 85-645, which is now codified at Sections 37-14-30 through 37-14-40 of the Alabama Code. (97a-125a). This act incorporated four additional agreements between electric suppliers into the overall operation of the territorial plan. Ala. Code § 37-14-36 (11-14) (1992). (115a). This act, like Act No. 84-206, provided that no subsequent accord between suppliers would be valid absent legislative review and legislative action to amend its statutes. Ala. Code § 37-14-36 (1992). (116a).

Governmental territorial division of electrical service areas in Alabama, then, is a relatively recent phenomenon. However, it is in no sense unparalleled among the various states; some 34 other states, desiring to prevent wasteful duplication of facilities, have enacted procedures providing for permanent boundaries or service areas for electric suppliers.[4] With the enactment of Act No. 84-206 and of Act

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[3] This judgment was subsequently vacated on jurisdictional grounds. *Dixie Elec. Coop. v. Citizens of Ala.*, 789 F.2d 852 (11th Cir. 1986).

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[4] Ga. Code Ann. §§ 46-3-1 *et seq.* (Michie 1992); Idaho Code §§ 61-332 *et seq.* (1994); Ill. Comp. Stat. §§ 30/1 *et seq.* (1992 & Supp. 1993); Ind. Stat. Ann. §§ 8-1-2.3-1 *et seq.* (1991); Iowa Code §§ 476.22 *et seq.* (1993); Kan. Stat. Ann. §§ 66-1, 170 *et seq.* (1992); Ky. Rev. Stat. Ann. §§ 278-016 *et seq.* (1989 & Supp. 1994); La. Rev. Stat. Ann. § 45.123 (Supp. 1994); Minn. Stat. §§ 216B.37 *et seq.* (1992 &

No. 85-645, Alabama has now joined her sister states in their conclusion that a system of retail electric territorial allocation is in the public interest, and that this public interest outweighs the interest of any individual supplier.

2. *Proceedings Below:*

Plaintiffs, 30 municipal and public corporations supplying electricity at retail ("Cities"), filed suit in the United States District Court for the Middle District of Alabama against Alabama Power Company ("Alabama Power"), 23 rural electric cooperatives ("Cooperatives"), and the Alabama Rural Electric Association of Cooperatives ("AREA"). The Cities sought declaratory relief, injunctive relief, and damages from all defendants, alleging a conspiracy to suppress competition in the retail electric market in violation of antitrust laws. Specifically, the Cities alleged that Alabama Power and the Cooperatives had conspired with the Alabama Legislature to divide and designate retail electric territories.

Following a hearing, the district court granted Defendants' Motion to Dismiss, which had asserted Defendants' immunity from antitrust liability under the *Noerr-Pennington*[5] doctrine and the state action doctrine first enunciated by this Court in *Parker v. Brown*, 317 U.S. 341 (1943). (61a-69a). The Cities appealed this dismissal order to the Court of Appeals for the Eleventh Circuit, which affirmed

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Supp. 1993); Mo. Rev. Stat. §§ 393.106, 394.315 (1993 Supp.); Mont. Code Ann. §§ 69-5-101 *et seq.* (1993); Neb. Rev. Stat. § 70-1001 *et seq.* (1990 & Supp. 1994); N.C. Gen. Stat. §§ 62-110.2 (1994), 160A-331 *et seq.* (1994 Supp.); N.D. Cent. Code §§ 49-03-01.1 *et seq.* (1978 & Supp. 1993); Ohio Rev. Code Ann. §§ 4933.81 *et seq.* (Baldwin 1991); Okla. Stat. §§ 158.21 *et seq.* (West 1991 & 1993); S.C. Code Ann. §§ 58-27-610 *et seq.* (Law. Co-op. 1977 & 1993 Supp.); S.D. Codified Laws Ann. §§ 49-34A-42 *et seq.* (1993); Tenn. Code Ann. §§ 65-34-101 *et seq.* (1993); Va. Code Ann. § 56-265.3 (Supp. 1994); Wis. Stat. § 196.495 (1993).

In addition, a number of state governments have reserved the right to determine territorial boundaries without expressly delineating territories by statute, including Alaska, Arizona, California, Colorado, Delaware, Florida, Mississippi, New Mexico, Oregon, Pennsylvania, Texas, Utah, Vermont, and Wyoming. Typically, these boundaries are set by an executive agency.

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[5] *Eastern R.R. President's Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) (immunizing efforts among competitors to restrain trade by petitioning government officials).

the district court's determination that Defendants' allegedly anticompetitive conduct in securing passage of Act No. 84-206 and of Act No. 85-645 was not actionable under the *Noerr-Pennington* doctrine. (49a-50a). This issue before the Court of Appeals is not raised by Petitioners in this Court.

However, with respect to the actions of the Defendants taken pursuant to the Acts (i.e., after their passage), the Court of Appeals affirmed in part and reversed and remanded in part. (50a-51a). In reaching its conclusion, the Court of Appeals analyzed whether the Acts met the two-pronged test set forth in this Court's opinion in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). (41a-42a). The Court of Appeals, applying *Midcal*, stated that "[a] state statute limiting competition will not run afoul of the Sherman Act provided that: (1) the challenged state statute was implemented pursuant to a clearly articulated state policy restraining competition; and (2) the policy was actively supervised by the state." (41a). The Court of Appeals found that the Acts clearly articulated a state policy to displace competition, but bifurcated its analysis of the supervision requirement of *Midcal*: it reviewed the general territorial boundary rules contained in the Acts separately from the boundaries set forth in the incorporated private agreements that departed in some respects from the general territorial rules. (41a-49a). The Eleventh Circuit concluded that the Alabama Legislature had reserved control in the general provisions of the Acts over all of the claimed anticompetitive decisions challenged by the Cities, and that the Acts set forth the precise procedures that suppliers must follow to service areas outside municipal limits. (45a-46a). However, the Court of Appeals held that because the incorporated agreements listed at Sections 37-14-8 and 37-14-36 of the Alabama Code were not then in the record, it could not determine whether they complied with *Midcal*'s supervision requirement. (48a). Thus, the Court of Appeals remanded only the question of whether the incorporated agreements were actively supervised to the district court. (49a, 51a).

On remand, the district court considered whether the private ter-

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[6] The district court did not reach the question whether, because municipal entities were parties to several of the agreements, such agreements would not be subject to active supervision. (21a).

ritorial agreements adopted by the Legislature into the overall plan of the Acts met *Midcal*'s active supervision requirement.[6] The district court concluded that the private agreements incorporated into the Acts left no room for discretionary anticompetitive behavior by the parties; construing the "subsequent agreement" provisions of the Acts, it specifically found that any modification of the incorporated agreements would require legislative approval under Alabama Code Section 37-14-36 and its counterpart in Act No. 84-206 (Section 37-14-8) (19a). The district court thus granted summary judgment in favor of the Defendants and again dismissed Petitioners' Complaint.

Petitioners again appealed to the Court of Appeals for the Eleventh Circuit, which affirmed the district court. (1a-7a). The Court of Appeals reviewed the incorporated agreements that the Cities contended allowed for territorial modifications without legislative approval, and juxtaposed the contract language that appeared to allow some limited discretion in customer allocation with the Legislature's mandate that no subsequent agreement shall be valid until reviewed by it. (4a-7a). The Court of Appeals held that the district court's interpretation of the Acts so as to require legislative approval of modifications to existing agreements was consistent with the statutes' plain language, and that the incorporated private agreements therefore qualified for state action immunity. (7a-8a). The Court of Appeals subsequently denied the Cities' Petition for Rehearing and their suggestion of rehearing en banc, and the Cities have now petitioned this Court for a Writ of Certiorari directed to the Court of Appeals for the Eleventh Circuit to review that court's judgment.

## REASONS FOR DENYING THE WRIT

### I. The Decision of the Court of Appeals Does Not Conflict With This Court's Opinions

Petitioners have asserted throughout this litigation that the Alabama Legislature's adoption of two statutes dividing electric service territories at retail constitutes a violation of federal antitrust laws. However, the Petitioners have never fully addressed the import of the legislative nature of the current service divisions, but have instead insisted upon drawing attention to the private origin of incor-

porated agreements between electric suppliers that predate adoption of the Territorial Acts. Under the Petitioners' theory, the Court of Appeals for the Eleventh Circuit incorrectly decided this case because some of the territorial boundaries incorporated into the statute were originally drawn by private entities rather than by legislators. However, this fact does not create a conflict with this Court's decisions relating to legislative action of an anticompetitive nature, and review by this Court is thus not warranted.

The concept of exempting actions mandated by a state's government from the purview of antitrust laws was first cogently articulated by this Court in 1943 in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, this Court upheld a state's imposition of a government marketing and grading program upon its resident raisin growers, which resulted in reduced competition among those growers. The Court's language in this regard is instructive:

> [The state prorate program] derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature . . .
>
> . . .
>
> The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state . . . [and t]here is no suggestion of a purpose to restrain state action in the Act's legislative history. . .
>
> . . .
>
> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.

*Parker*, 317 U.S. at 350, 351, 352. Thus, the *Parker* Court recognized that the elimination of competition, when directly effected by a state legislature, is permissible under federal antitrust laws.

In the decisions since *Parker*, the Court has refined state action analysis so as to ensure that antitrust immunity is afforded only when the conduct undertaken by market participants can fairly be said to have been authorized or approved by the state as sovereign. Thus, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court invalidated a state statute forbidding licensees in the wine trade from selling at a price below that set by the producers; the Court articulated two prerequisites that a restraint of trade must meet to qualify private market participants for immunity under the state action doctrine: "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks omitted). Petitioners contended below that the Territorial Acts do not satisfy *Midcal*'s active state supervision test, and Petitioners again have raised that contention in this Court in seeking certiorari review.

However, Petitioners fail to grasp the legal operation of the Territorial Acts upon retail electric service. In the Acts, each electric customer is legislatively assigned to the electric supplier whose distribution lines on April 26, 1984 were in closer proximity to the customer's premises, as a general rule. Ala. Code § 37-14-3(1) (1992) (76a-77a). The Alabama Legislature, however, exempted large load industrial customers (whose initial service requirements equal or exceed 2500 kilowatts) from the Acts; moreover, it declared that the procedures set forth in several previously-executed agreements between retail electric suppliers would govern in areas where the incorporated agreements are applicable. Ala. Code §§ 37-14-3(2), 37-14-8, 37-14-36, 37-14-40 (1992) (79a-80a; 86a-88a; 113a-115a; 124a-125a). Thus, the Alabama Legislature has enacted concrete substantive legislation suppressing competition under which retail electric service territories are allocated to specific providers under general and special territorial rules. Therefore, in both the case of a customer outside an incorporated agreement area and of a customer inside an incorporated agreement area, the state legislature has affirmatively chosen who will provide retail electric service.

This factor is crucial, for it takes this case outside the *Midcal* rule petitioners have advocated. That *Midcal* does not apply in such circumstances has been settled at least since *Hoover v. Ronwin*, 466 U.S. 568 (1984), in which this Court upheld an antitrust challenge to

a state supreme court bar admission committee's alleged conspiracy to reduce the number of practicing attorneys in that state. The *Hoover* Court analogized a state supreme court acting in a legislative capacity to a state legislature, reasoning as follows:

> [U]nder the Court's rationale in *Parker*, when a state legislature adopts legislation, its actions constitute those of the state . . . and *ipso facto* are exempt from the operation of antitrust laws . . . [A] state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature.

*Hoover*, 466 U.S. at 567-68. The *Hoover* Court rejected *Midcal*'s applicability in circumstances where the legislature acts directly:

> Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to the state authorization. [citing *Midcal*] . . . When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. *Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."*

*Hoover*, 466 U.S. at 568-569 (emphasis added; footnote omitted).

In this case, Petitioners claim that the private agreements "were merely ratified or rubber-stamped by the Alabama Legislature." (Pet. Cert. 20). However, it is precisely because the Legislature has acted that the state action doctrine applies to the Territorial Acts:

> The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of the State acting as sovereign.

*Hoover*, 466 U.S. at 574 (internal quotation marks omitted). Here, the Alabama Legislature has chosen to act, and its reasons and relative wisdom have no place in any inquiry concerning the applicability of antitrust laws to its choice in the field of retail electric service.

Petitioners have advocated granting their petition and/or summary reversal on the basis of not only *Midcal*, but the subsequent decision

in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), which was handed down after the district court's second dismissal but well before the Eleventh Circuit's second decision in 1994. *Ticor* involved a negative option rate scheme whereby state agencies (not the legislature itself) possessed a "veto" power over the rates of various title insurers in several states; the Court found the conduct involved essentially to be that of private actors and not the state itself. However, just as *Midcal*'s two-pronged test was held inapplicable in *Hoover* when a state legislature acts, so too would *Ticor*'s reasoning be completely inapplicable to conduct of the sovereign that displaced effective discretion of private actors. By enacting the Territorial Acts, the Alabama Legislature has occupied the field so as to elimate the ability of private suppliers to make effective decisions as to service territories without legislative approval.[7] Moreover, because the legislature has acted, this Court should reject Petitioners' request that this Court go behind the legislative procedures used and examine the process by which the legislature reached its decisions; this Court has rightly and consistently declined to proceed down that slippery slope. *See, e.g., City of Columbia v. Onmi Outdoor Advertising, Inc.*, 499 U.S. 365, 374-79 (1991).

The Petitioners further contend that the citation in the *district court's opinion* (unreported) of the Third Circuit's reversed opinion in *Ticor* warrants review by this Court. Pet. Cert. 21. This betrays a lack of regard for the role of the Court of Appeals in this case, which has already heard and considered the Petitioners' arguments in light of both this Court's inapposite opinion in *Ticor* and the analogous authority of *Hoover*; before the Court is the Eleventh Circuit's 1994

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[7] Petitioners claim that the construction of the Acts adopted by the Eleventh Circuit (requiring legislative approval for any alterations of territories) would defy "common sense" by causing parties to go without electricity for months between legislative sessions. Pet. Cert. 14 n. 10. Of course, what the Cities neglect to mention is that the Territorial Acts encompass the entire state, leaving no area without a supplier of electricity; thus, while a particular customer may not legally be supplied by a supplier other than his or her assigned supplier without legislative action, he or she is nonetheless eligible to receive electric service from that supplier while the legislature considers any applicable territorial reallocation. Thus, the only customers that actually "go for months without electricity" are those so obstinate that they will not accept service from their legislatively-mandated supplier until it is changed to suit their private wishes, regardless of such public considerations of wasteful duplication, aesthetic ruin, etc.

judgment, not the district court's pre-*Ticor* opinion. Certainly, *Ticor* does not warrant summary reversal or remand of the Eleventh Circuit's judgment, as (1) *Ticor* is merely a straightforward reiteration and application of the *Midcal* test, which *Hoover* held inapplicable on these facts; and (2) *Ticor* predates the Eleventh Circuit's decision by more than two years, and was fully briefed and argued by the parties below.

The result reached by the Eleventh Circuit is consistent with this Court's state action jurisprudence, and with scholarly commentary as well. For example, because of the relatively long procedural history of this case (involving two separate reported opinions), the noted antitrust commentators Phillip E. Areeda and Herbert Hovencamp have had an opportunity to consider the specific issue raised by Petitioners in the context of this case. Their analysis is illuminating:

> Suppose that a group of utilities divide certain service areas and propose to the Legislature that their divisions, marked on a map, be ratified by a statute that effectively gives each utility a monopoly in its marked-out area. In that case, the boundaries themselves would appear to be part of the state's policy and with respect to their basic location, there is nothing left to be administered by the private parties. *Parker* should apply, notwithstanding the fact that the original line-drawing was undertaken by private parties acting in concert.

Phillip E. Areeda & Herbert Hovencamp, *Antitrust Law* ¶ 212.7c (1993 Supp.).[8]

Petitioners, unable to create a conflict worthy of certiorari review by pointing to any of Respondents' pre-enactment activity, cite the existence of discrete provisions in three incorporated agreements whose terms Petitioners claim confer discretion upon the parties to those agreements to alter certain service boundaries. By doing so, Petitioners seek to have this Court review the district court's and the Eleventh Circuit's construction of the Territorial Acts, which was

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[8] See also *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n. 6 (1987) (Court envisions that legislation requiring nondiscretionary twelve percent markup of actual wholesale cost of liquor would satisfy "active supervision" principles and would be exempt under *Parker*).

that the Acts preempt any modifications without legislative approval. It will be sufficient to note in this regard that both Territorial Acts contain language providing that "no *subsequent agreement* shall be valid unless and until it has been reviewed" by the legislature and approved by that body via amendment of the Territorial Acts. Ala. Code § 37-14-8, 37-14-36 (1992) (emphasis added). The district court in this case, bound by Alabama state law compelling construction in favor of the validity of the statute (*see Thomas v. Reliance Ins. Co.*, 617 F.2d 122, 125 (5th Cir. 1980)[9]; *House v. Cullman County*, 593 So. 2d 69, 71-71 (Ala. 1992)), held that the term "subsequent agreement" in the Territorial Acts included agreed modifications to the incorporated accords, as well as brand new agreements concerning service divisions. The Eleventh Circuit, bound to perform plenary review of such legal questions (*Salve Regina College v. Russell*, 499 U.S. 225 (1991)), did so and found no error. There is nothing to be found in the opinions below or on this record that would counsel abandonment of this Court's salutary practice of deferring to the construction of state statutes such as the Territorial Acts by lower courts (*e.g., Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 499 (1985)), who are better schooled in and more able to interpret the laws of their respective states (*id.*).

Even had some discretion effectively to alter the incorporated agreements actually remained in the original parties, there would nevertheless be no applicable requirement of active supervision of the conduct of the parties. It will be noted that all three agreements cited by the Petitioners as purportedly allowing for bilateral revisions (i.e., the Tarrant City/Alabama Power Company agreement, the Cullman Utilities Board/Cullman Electric Cooperative agreement, and the Southern Pine Electric Cooperative/City of Evergreen agreement (126a-137a, 150a-51a)) involve a municipality as a party. This Court has squarely held that the second prong of the *Midcal* test, that of active supervision of anticompetitive conduct, does not apply to municipal actors. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Even under the Petitioners' theory, for a bilateral revision to take place with respect to these incorporated agreements, a peti-

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[9] The district court was bound by this former Fifth Circuit precedent. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

tioner municipality must acquiesce to the change, and because its anticompetitive conduct need not meet *Midcal*'s second prong, the manifestation of that conduct (i.e., a modification of service boundaries) need not meet "active supervision" scrutiny.

From a review of the pertinent authorities of this Court, one is left with the inescapable conclusion that the activities challenged by the Petitioners fall inside the parameters of the *Parker* state action doctrine, as construed in *Hoover*. Petitioners have failed to show any conflict between this Court's *Midcal/Ticor* active supervision test applicable to non-sovereigns and the result reached by the Eleventh Circuit — there exists no authority on the part of retail electric sellers to agree to alter the legislatively-created boundaries of Alabama electric service areas, and no discretion is left to private entities triggering *Midcal*'s supervision requirement. Thus, Petitioners' requests that a writ of certiorari issue and that the judgment of the Eleventh Circuit be vacated are due to be denied.

## II. *Parker v. Brown* is Not Due to be Revisited

From the forgoing, it will be noted that the Eleventh Circuit's judgment, rather than conflicting with the Court's state action precedents, is wholly consonant with them. However, Petitioners do not content themselves merely with relying upon a perceived conflict between this Court's opinions and the Eleventh Circuit's decision, but also contend that this Court should re-examine the *Parker* state action doctrine *in toto*. This invitation should be rejected, not only because the state action doctrine has become a fixture of antitrust jurisprudence that has the implicit approval of Congress, but because *Parker*'s central holding is fundamentally sound; moreover, this case is ill-equipped to serve as a vehicle for such a re-examination.

*Parker v. Brown* was decided in 1943, at the beginning of the 78th Congress. The United States has recently elected and installed the 104th Congress, and during the fifty-two-year interim, no legislation has been adopted to alter or abrogate the *Parker* holding with respect to state action antitrust exemptions. Twenty-six Congresses have been aware of the state action doctrine and have left the Sherman and Clayton Acts intact in this respect.

Moreover, this Court ten years ago considered whether *Parker* should be overruled in the face of a dissenting opinion that would

have held that exceptions from the Sherman Act must come from Congress, and not the Court. *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 68 (1985) (Stephens, J., dissenting). Six members of this Court joined Justice Powell's opinion for the Court, which contained this rejoinder:

> [T]he logical result of [the dissent's] reasoning would require us to overrule *Parker v. Brown* and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine.

471 U.S. at 55 n. 18. If over 40 years of congressional acquiescence counseled against judicial abandonment of the *Parker* doctrine in 1984, there can be no question that over 10 additional years of such silence give rise to an even greater justification not to tamper with fundamental antitrust jurisprudence, as Petitioners would advocate.[10]

Additionally, *Parker*'s reasoning remains fundamentally sound, in that fifty-two years have not altered the absence of any contemporary indication in 1890 that the Sherman Act was intended to restrain state action. 317 U.S. at 351. The absence of clear language in the Sherman Act making it applicable to actions of state legislatures, such as Alabama's in this case, shows an implicit congressional intent to respect the rights of state governments in a federal system: "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351. Congress is constitutionally empowered to preempt state power in certain circumstances, and has certainly proved capable of drafting statutes to accomplish that end (e.g., 29 U.S.C. § 1144(a) (1988) (ERISA preemption clause)), which only increases the cogency of *Parker*'s analysis of the silence of antitrust law in this regard.

Finally, this case does not present a proper one for reconsideration of *Parker*. Petitioners here are fighting a rear-guard action against

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[10] In the 52 years since *Parker*'s decision, Section 1 of the Sherman Act (15 U.S.C. § 1 (1988)) has been re-enacted four times without substantial change (in 1955, 1974, 1975, and 1990), which indicates congressional ratification of the Court's interpretation of the Act's substantive exemptions. *See Douglas v. Sea Coast Prods., Inc.*, 431 U.S. 265, 278-79 (1977).

a state-mandated effort to reduce wasteful duplication of electric generating and transmitting resources in Alabama by claiming that all other electric suppliers "captured" the Alabama Legislature and caused it to pass legislation vesting broad discretion along certain incorporated-agreement service boundaries in the various suppliers' territories. What Alabama has done is no different from the actions of at least 34 additional states that allocate electric supply privileges among various retail suppliers.[11] The injection of uncertainty in the applicability of the state action doctrine would disrupt the territorial divisions of (and service of electricity to) customers in those states, in the name of furthering competition at the expense of an express state policy to limit it. Certainly, the legislatures of forty-eight states should not be compelled against their will to follow two states' proposed novel procompetition experiments in the area of retail electricity if they deem competition wasteful, duplicative, and aesthetically destructive as Alabama does.[12]

Finally, Petitioners resort to a claim that certiorari should be granted because of a claimed refusal or failure to exchange territorial maps. Assuming for the moment the truth of this contention, which these Respondents would dispute,[13] this fact does not warrant the grant of certiorari review in this Court. Petitioners are well aware of their rights under state law to compel compliance with such provisions of the Territorial Acts[14], and may resort to these adequate remedies if their claims are meritorious. However, to grant certiorari on the grounds of a claimed failure to comply with a state law map exchange requirement would be a great waste of this Court's finite resources, and these Respondents urge rejection of this last, desperate ground asserted by the Petitioners.

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[11] See note 4, above.

[12] A reference to the California and Michigan proposals cited by the Petitioners (Pet. Cert. 27-28).

[13] Absolutely no factual substantiation for this claim appeared in the record before the Court of Appeals.

[14] Ala. Code § 37-14-9 (1992).

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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No. 94-956

(4)

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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1994

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THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners,*

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

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## RESPONDENT ALABAMA POWER COMPANY'S BRIEF IN OPPOSITION

---

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## QUESTIONS PRESENTED

1. Whether the courts below properly invoked state action immunity where the actions of the Alabama Legislature left no meaningful discretion over competitive restraints in the hands of electric suppliers.

2. Whether the courts below erred by declining to scrutinize the Alabama Legislature's pre-enactment consideration of the Acts and the agreements incorporated in the Acts.

3. Whether this case suggests a need for the Court to re-examine and reformulate the state action doctrine.

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THE MUNICIPAL UTILITIES BOARD OF ALBERTVILLE, ALABAMA, *et al.*,
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ALABAMA POWER COMPANY, *et al.*,
*Respondents.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit**

---

## RESPONDENT ALABAMA POWER COMPANY'S BRIEF IN OPPOSITION

---

Respondent Alabama Power Company ("APC")[1] respectfully requests that the Court deny the petition for writ of certiorari seeking review of the Eleventh Circuit's decision in this case. That opinion is reported as *Municipal Utilities Board of Albertville v. Alabama Power Co.*, 21 F.3d 384 (11th Cir. 1994) (*Municipal II*).

## STATEMENT OF THE CASE

1. *Factual Background*: In addition to the background facts described in the Petition for Writ of Certiorari filed by the petitioner municipal electric suppliers

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[1] The Southern Company is the parent of APC; Southern Electric Generating Company is the only subsidiary of APC which is not wholly owned by APC.

(collectively, the "Cities") in this action, APC directs the Court's attention to the following additional facts.

The Alabama Legislature (the "Legislature"), in adopting the 1984 Service Territories for Electric Suppliers Act and the 1985 Service Territories for Electric Suppliers Act (collectively, the "Acts"), sought to address the problems associated with uneconomic duplication of electric distribution facilities in Alabama. Commencing in 1979, the Legislature undertook a comprehensive examination of legislation designed to deal with the economic, environmental and other problems caused by electric distribution facility duplication. *See* 1979 Ala. Acts 764. Act No. 79-764 established a Joint Interim Committee on Electricity (the "Joint Committee") to develop legislation "to avoid wasteful, uneconomic duplication of electric facilities, the cost of which must be borne by the consumers." *See Municipal Utilities Board of Albertville v. Alabama Power Co.*, 934 F.2d 1493, 1496 (11th Cir. 1991) (*Municipal I*) (quoting 1979 Ala. Acts 764). As noted by the Eleventh Circuit in *Municipal I*, "the Alabama Legislature instructed the [Joint] Committee to develop this legislation in consultation with the three principal distributors of electricity in the state, investor-owned utilities, rural electric cooperatives, and municipal electric systems, *e.g.*, APC, the cooperatives, and the Cities." *Id.* at 1496 n. 2.

The Joint Committee, formed by legislative directive, studied the duplication problem and issued a report concluding that some form of electric service area legislation was desirable and encouraging all interested parties, including APC, the cooperatives and the Cities, to develop proposals for legislation to address the problem. To encourage input from interested parties, the Governor, Lieutenant Governor and the Speaker of the House wrote to electric suppliers in September of 1979, urging the development of consensus legislation. The Legislature considered proposed legislation to deal with the electric line

duplication problem in every session after 1979 until the first of the Acts was passed in 1984. By the time the Legislature reviewed and then passed the 1984 Act, the subject of electric service area legislation was a familiar subject, not one that caught the Legislature unaware.[2]

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[2] The Cities have attempted to impeach the integrity of the Alabama legislative process by referring to the Legislature's findings that the incorporated agreements "[had] been reviewed by the legislature," as an "empty recitation." (Cities' Petition at 10). Furthermore, the Cities attempt to draw the federal courts into a fact specific inquiry concerning the decades-old thought processes of Alabama legislators by extracting a small portion of the deposition of Senator Eugene Foshee from the separate case of *Dixie Elec. Coop. v. Citizens of Ala.*, CV-84-575-PR (Circuit Court of Montgomery County, Alabama). Such testimony is irrelevant to proper state action analysis. To hold otherwise would be to initiate an endless inquiry into the thoughts and understandings of each legislator—a process which is likely to be inconclusive even when the review is limited to a single state senator. For example, among other testimony given by Senator Foshee in the same deposition was the following:

> Q. Okay. Do you recall some period of time, and this appears to be about 14 days after it was introduced, that there was a public hearing before the Senate Commerce Transportation and Utilities Committee?
>
> A. There was a public hearing, I wouldn't swear that that's the right date. Sounds and looks like it.
>
> * * * * *
>
> Q. Do you recall what happened at that committee meeting?
>
> A. There was—several people testified, some pro and some con.
>
> Q. Okay. Testified relative to the bill you had introduced.
>
> A. Right.
>
> Q. Either for it or against it?
>
> A. That's correct.
>
> * * * * *
>
> Q. Okay. Then on March 27, 1984, Exhibit 1 shows that we had the third reading of the bill and the filibuster, you recall that?
>
> A. That's correct.

[Continued]

In 1984, the Legislature passed the 1984 Act and declared that the Act reflected the Legislature's investigation of the "economic, financial and environmental impact associated with the potential for duplication of electric distribution facilities used for the furnishing of retail electric service." *Ala. Code* § 37-14-1 (1992). Benefitting from the work of the Joint Committee and the experience of nearly five years of unsuccessful attempts to pass remedial territorial legislation, the Legislature concluded that the benefits of competition in retail electric markets were outweighed by the burdens of duplicative electric facilities. *Id.* The Legislature adopted the 1984 Act by an overwhelming majority on April 26, 1984.

The 1984 Act sought to eliminate future duplication of facilities at the retail level by assigning service territories to the State's electric suppliers, and in some instances, by allowing suppliers to purchase existing facilities of other suppliers. To accomplish this objective, the 1984 Act employed three types of mechanical rules: (1) rules governing activities inside existing municipal limits; (2) rules governing activities outside existing municipal limits; and (3) rules incorporating specific agreements which were in existence when the Act was adopted. *See Municipal I*, 934 F.2d at 1497. The Eleventh Circuit

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[2] [Continued]

Q. Okay. Was there debate on the floor of the Senate on that day, the day of the filibuster and the third reading?

A. Seems to me like the filibuster lasted two or three days which usually brings up a lot of debate.

Q. Pro and con?

A. Yes, I would say both ways. Some questions asked.

Q. Do you recall what subjects were discussed?

A. Not specifically, but different parts of the bill questions were asked about; I don't remember the exact questions.

Q. Would you remember what parts of the bill were discussed?

A. Practically every part I think.

summarized these three sets of rules in its disposition of the first appeal of this case. *See id.*

The Legislature also established a mechanism for judicial review of the constitutional validity of the 1984 Act prior to consummation of the various purchase and sale transactions contemplated by the Act. *See Ala. Code* § 37-14-10. An action commenced under that mechanism in 1984 ultimately was removed to federal district court in Alabama. Although the federal district court perceived certain constitutional infirmities with the 1984 Act, the court's determination was subsequently vacated for want of jurisdiction. *Dixie Electric Cooperative v. Citizens of the State of Alabama*, 789 F.2d 852 (11th Cir. 1986) (vacating district court order). In the meantime, the Legislature had responded to the initial decision by adopting the 1985 Act, which resembled the 1984 Act but included changes designed to cure the perceived constitutional infirmities. Following commencement of a second validation proceeding, the Alabama Supreme Court upheld the Acts against the primary constitutional challenge under *Ala. Const. of 1901*, art. XII, § 220 (establishing municipal consent as a precondition to certain local utility service). *Alabama Power Co. v. Citizens of the State of Alabama*, 527 So.2d 678 (Ala. 1988). The Alabama Supreme Court then remanded the case to the trial court for consideration of the remaining constitutional challenges. To date, the trial court has not ruled on the additional challenges.

2. *Proceedings Below*: This antitrust action was commenced in 1989 and now has been before the district and circuit courts twice. Initially, the district court granted the defendants' motions to dismiss on *Noerr-Pennington* [3]

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[3] This doctrine precludes application of the Sherman Act to attempts to influence the passage or enforcement of laws, even though the requested official action would produce a restraint on trade or a monopoly. *See Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965).

and state action immunity grounds. *Municipal Utilities Board of Albertville v. Alabama Power Co.*, No. 89-H-519-N, unpublished memorandum opinion (M.D. Ala. Jan. 9, 1990) (Cities' Appendix E). In doing so, the district judge expressed his view that the Cities had merely attempted to continue in the judicial arena a battle they lost in the Legislature. *Id.* at 69a.

On the first appeal, the Eleventh Circuit affirmed the dismissal of the Cities' complaint with respect to the general provisions of both Acts. The court expressly found that the two-pronged test of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) had been satisfied. The court ruled that the Acts expressed a clear state policy to displace competition and that conduct of private parties under the Acts was actively supervised. Essentially, the court determined that the general provisions of the Acts were so detailed that they left private parties with no discretion over anticompetitive matters. *See Municipal I*, 934 F.2d at 1503. With respect to the incorporated agreements, however, the Eleventh Circuit remanded the case because those agreements were not part of the appellate record.

On remand, the district court reviewed the incorporated agreements and found that they too met *Midcal's* active supervision requirement. *Municipal Utilities Board of Albertville v. Alabama Power Co.*, No. 89-H-519-N, unpublished memorandum opinion (M.D. Ala. Mar. 4, 1992) (Cities' Appendix B) ("*Remand Opinion*"). In reaching this conclusion, the district court relied upon the active supervision standard recently applied by this Court in *Patrick v. Burget*, 486 U.S. 94 (1988) (state officials must "have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy").[4] The district court

[4] Although the district court cited to the opinions of the Third Circuit in *Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir.), *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *rev'd*, 112 S. Ct. 2169 (1992) and the First Circuit

made its immunity finding despite the Cities' contention that three of the incorporated agreements appeared to allow electric suppliers some future discretion to amend or alter the service area allocations. The district court read these provisions together with the Acts' statements that any new incorporated agreements likewise required legislative approval, and determined that the Legislature "did not intend to confer unsupervised private discretion" on electric suppliers when it incorporated the three agreements. *Remand Opinion* (Cities' Appendix B at 19a). The court noted its obligation to save rather than destroy the Acts in selecting among competing interpretations, and recognized the propriety of the Legislature using different means to eliminate duplication in a way that takes account of local conditions. *Id.* at 18a-20a.

On the second appeal, the Eleventh Circuit accepted the district court's interpretation of the Acts and their incorporated agreements and affirmed the active supervision holding. Like the district court, the Eleventh Circuit accepted the Acts' express legislative findings and refused to go behind them. *Municipal II*, 21 F.2d at 387 88 n.4.

## SUMMARY OF ARGUMENT

Because the conduct complained of in this case is that of the Alabama Legislature in adopting the Acts, it is *ipso facto* immune under the state action doctrine. Even if this were not so, the lower courts correctly recognized that the Acts meet the two-part *Midcal* test because they clearly articulate the State's policy to displace competition, and prescribe detailed rules to implement electric service area assignments. The incorporated agreements are an integral part of the State's regulatory program, and while they establish different service area boundaries than

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in *New England Motor Rate Bureau v. FTC*, 908 F.2d 1064 (1st Cir. 1990), the court's application of the active supervision standard tracked the standard from *Patrick*.

the Acts' general rules, they accomplish the same purpose —elimination of costly duplication of electric facilities. The rules contained in the incorporated agreements only can be altered in the future with explicit legislative sanction. The Acts thus afford no opportunity for future unsupervised private discretion.

The Cities fault the decisions below because (i) they relied on an allegedly erroneous interpretation of the Acts, (ii) they accepted the Legislature's explicit findings in the Acts, (iii) they declined to inquire into the level of each legislator's "critical evaluation" of the incorporated agreements, and (iv) they declined to review claimed procedural irregularities associated with passage of the Acts. To describe the sort of state action analysis urged by the Cities is to refute it. To second-guess the legislative process, as the Cities suggest, would be unworkable and fundamentally at odds with the federalism of *Parker*. This Court's refusal in *Ticor* to immunize conduct resulting from regulatory inaction in no way sanctions scrutiny of the Legislature's deliberations or judicial disrespect of explicit legislative findings.

If the state action doctrine were in need of re-examination, this case would provide a poor setting in which to conduct that re-examination. This case involves conduct at the heart of the *Parker* doctrine—the state legislative process itself. No state action pronouncement of this Court has ever sanctioned direct disregard for the text of state legislation, and nothing short of such direct disregard would warrant reversal of the decision below. Review of this case would not only embroil the federal courts in the unnecessary interpretation of state statutes, but also embroil the federal courts in the political give-and-take that produced those statutes. The federalism concerns behind *Parker* must not be so seriously compromised.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE COURT BELOW PROPERLY HELD THAT THE CITIES' CLAIMS WERE BARRED BY STATE ACTION IMMUNITY WHERE THE LEGISLATURE LEFT NO MEANINGFUL DISCRETION OVER RESTRAINTS ON COMPETITION IN THE HANDS OF PRIVATE PARTIES.

#### A. The actions complained of by the Cities are actions of the sovereign which are *ipso facto* state action and immune from antitrust scrutiny.

The decisions of the Eleventh Circuit and the district court properly recognized that the Legislature, acting as sovereign, enjoys immunity under the state action doctrine. The seminal case which addressed the relationship of federalism and state sovereignty in the antitrust context was *Parker v. Brown*, 317 U.S. 341 (1943), in which this Court first invoked principles of federalism to conclude that the antitrust laws do not apply to conduct of the sovereign states acting as such. *Id.* at 350-51. Recognizing that Congress never expressed an intention to make state legislatures subject to antitrust limitations, the Court has consistently refused to infer such a purpose. *See id.* Under *Parker*, "when a state legislature adopts legislation, its actions constitute those of the State . . . and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). As explained in *Hoover*:

> The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. 'There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history.' *Parker*, 317 U.S. at 351. The Court did not suggest in *Parker*, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only

> requirement is that the action be that of 'the State acting as a sovereign.' *Bates* [*v. State Bar of Arizona*, 433 U.S. 350], 360 [(1977)] . . . .

466 U.S. at 574.

Although the Cities characterize their claims as a challenge to regulated, private anticompetitive conduct, their Petition is riddled with complaints relating to legislative action and procedure in enacting the two territorial Acts.[5] Both the Eleventh Circuit and the district court determined that the actions of the Legislature in incorporating specified agreements satisfied the two-part test of *Midcal*. According to the decision in *Hoover*, however, it was unnecessary for the courts below to reach those conclusions, because, in the Court's words, the more stringent *Midcal* test only is required "when the activity at issue is *not* directly that of the legislature or Supreme Court." *Hoover*, 466 U.S. at 568 (emphasis added); *Id.* at 569 ("Where the conduct at issue is in fact that of the state legislature . . . we need not address the issues of 'clear articulation' and 'active supervision.' "). Although APC, obviously, is a private party, the Cities' brief makes it abundantly clear that "the activity at issue" here is direct legislative action that lies at the heart of the state political process. No previous precedents of this Court

[5] The Cities recite a litany of charges against the actions of the Legislature, as opposed to actions of respondents, attacking the lack of "legislative involvement in the formation of the [earlier] private agreements" (Cities' Petition at 8), claiming it was "impossible for the Legislature to scrutinize the private agreements" (*Id.*), stating the "agreements were never recorded as having been read in a legislative session . . . nor were they assigned . . . and reviewed by any legislative committee . . . nor were the merits . . . ever debated," (*Id.* at 8-9), alleging the "failure of the Legislature to review the private agreements" (*Id.* at 10), asserting the agreements were "merely ratified or rubberstamped by the Alabama Legislature" (*Id.* at 20), and charging the "suggestion of review was merely a recitation in the legislation" (*Id.*). The conduct complained of is clearly the action of the state. This conclusion is fully supported by *Parker*, *Bates*, and *Hoover*.

have sanctioned inquiry into this political process in the legislative arena.

The Cities' invitation to review the process by which the Legislature enacted the Acts, if accepted, would significantly undermine the principles of federalism enunciated in *Parker*. As this Court has noted, "[t]here is nothing in the state-action doctrine, or in antitrust law, that permits us to question the motives for the sovereign action. . . ." *Hoover*, 466 U.S. at 576 n.28. *See also id.* at 579-80; *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985). Electric utility regulation is intensely local,[6] and the Acts represent a local approach to the problem of uneconomic duplication of retail electric distribution facilities. To that end, the Legislature developed a regulatory program that was highly detailed and specific, and that relied on both a system of general rules and the incorporation of specified local agreements. This Court has aptly recognized "that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 377 (1991). The Acts represent nothing less than the Legislature's political judgment on this decidely local issue.

Federal antitrust courts are neither equipped nor permitted to second-guess the wisdom of state legislators. This Court has recognized that "*Parker* was not written in ignorance of the reality that determination of 'the public interest' . . . of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries." *Id.*

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[6] *See Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983) (utility regulation is one of the most important of traditional state police power functions).

Nonetheless, the Cities urge the Court to delve into the thoughts, motives and understandings of the Legislature (and, as illustrated by references to Senator Foshee's testimony, individual legislators) in enacting the Acts. If permitted, after-the-fact judicial review of this type would undermine the stability of the legislative process. *See id.* This kind of deconstruction of the legislative process has been consistently avoided. *See Omni*, 499 U.S. at 377; *Hoover* 466 U.S. at 579-580; *see also Llewellyn*, 765 F.2d at 774. The Eleventh Circuit properly rejected the Cities' request to explore how and why the Acts were passed as "patently meritless" and "unworthy of discussion." *Municipal II*, 21 F.3d at 387-88 n.4. *See Hoover*, 466 U.S. at 581 n.34 (a claim that the grading formula was devised to limit competition is basically a challenge against the motive of the sovereign). Once the actions complained of were determined to be acts of the sovereign state Legislature, all further inquiry concerning the deliberative process should have ceased.

**B. Assuming arguendo that the conduct in question is that of private parties, the court of appeals properly found that APC's conduct was immune from antitrust liability under the state action doctrine.**

Assuming that the mere involvement of APC as a defendant in this case invokes the two-part *Midcal* test (and APC submits it does not where the activity in question is conduct of the legislature itself), APC's conduct satisfies that test. Where conduct of private parties is involved, *Midcal* established a two-part test "to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick*, 486 U.S. at 99. Under the *Midcal* formulation, the challenged conduct must be pursuant "to a clearly articulated and affirmatively expressed state policy, and it must be 'actively supervised'

by the state itself." *Midcal*, 445 U.S. at 105 (citing *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) *overruled in part on other grounds, Hallie v. Eau Claire*, 471 U.S. 34 (1985)).

On the first appeal of this case, the court of appeals determined that the Acts met the first prong of *Midcal* because "[t]he Alabama Legislature has clearly articulated a policy to displace competition in the retail electric market except for large industrial customers." *Municipal I*, 934 F.2d at 1502 (citing *Ala. Code* §§ 37-14-1 and 37-14-30) (reducing the costs of line duplication is the policy supporting this regulation). The court of appeals also noted that the incorporated agreements were found by the Legislature to be consistent with the general purpose of the Acts. *Id.* (citing *Ala. Code* §§ 37-14-8 and 37-14-36) (The agreements were "reviewed by the legislature, determined to be in the public interest and found not to be inconsistent with the purposes and policies set forth in" the Acts.). For these reasons, the court below determined that the Acts, including the general provisions as well as the provisions incorporating the private agreements, satisfied the first part of the *Midcal* test. *Id.* The first prong of the *Midcal* test was not at issue on remand to the district court or on the second appeal to the Eleventh Circuit.[7]

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[7] The court of appeals properly noted that the state policy allowing anticompetitive conduct does not have to be expressly stated. *Id.* at 1502. To that end, this Court has "rejected the contention that [the first prong of the *Midcal* test] can be met only if the delegating statute explicitly permits the displacement of competition." *Omni*, 499 U.S. at 372-73 (citing *Hallie v. Eau Claire*, 471 U.S. 34, 41-42 (1985)). *See also Yeager's Fuel, Inc. v. Pennsylvania Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994) (legislation need not expressly permit the restraint on competition, rather it is sufficient if such a restraint is a foreseeable result of the legislation). In this case, of course, the language and structure of the Acts reflect an express determination by the Alabama Legislature that the costs of duplication outweigh the "benefit normally associated with competition." *See Ala. Code* §§ 37-14-1; 37-14-30.

### 1. *The Acts are self-executing statutes, which satisfy the active supervision requirement by leaving no discretion over anticompetitive conduct in the hands of private parties.*

The Cities' core argument is that the Acts do not satisfy the active supervision requirement of *Midcal*. This Court has most recently described the purpose of the active supervision requirement as providing for a means "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2177 (1992) (active supervision analysis focuses on whether the anticompetitive program "is the State's own"). Justice Kennedy also adopted the formulation of the active supervision requirement articulated in *Patrick*.[8]

In *Municipal I*, the court of appeals analyzed the general provisions of the Acts and concluded that the Legislature exercised adequate control over the Acts' service territory allocations to satisfy the active supervision requirement, noting that "the Alabama Legislature has control over all of the decisions being challenged by the cities in this litigation, . . . [and] the general provisions of the Acts have placed no decision-making authority over restraints on competition in the hands of private parties." *Municipal I*, 934 F.2d at 1503; *id.* (the "general provisions of the Acts eliminate virtually all discretionary behavior" by electric suppliers).[9]

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[8] "The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Ticor*, 112 S. Ct. at 2177 (quoting *Patrick*, 486 U.S. at 100-101).

[9] Commentators in the antitrust field have endorsed the decision by the court of appeals with respect to the general provisions of the Acts. Professors Areeda and Hovenkamp, for example, recently observed that as a result of the detailed and mechanical rules

After reviewing the incorporated agreements on remand from the Eleventh Circuit, the district court reached a conclusion similar to that reached by the court of appeals with respect to the general provisions. The district court concluded that "the procedures contained in the incorporated agreements, like the general rules embodied in the Acts, sufficiently control[led] the exercise of future discretionary behavior by electric suppliers to satisfy the active supervision requirement." *Remand Opinion* (Cities' Appendix B at 18a).[10] The district court also rejected the Cities' claim that the Acts allowed unsupervised private discretion by incorporating agreements that, in theory, could be modified by the parties. The court disagreed because the Legislature explicitly required subsequent mutual agreements to be approved by the Legislature. *Id.* at 19a. *See Ala. Code* §§ 37-14-8; 37-14-36.

The lower courts' approach to the active supervision requirement is supported by commentary as well as judicial pronouncements. The Acts represent examples of statutes that are "self-executing." Such statutes satisfy the active supervision requirement because they "leave nothing further to be decided by the relevant parties, as well as nothing for the state to supervise." P. Areeda and D. Turner, *Antitrust Law* ¶ 213d (1978). No regulatory body is left to supervise private conduct under the statute because the statute sets "forth the precise procedures" that must be followed to implement the legislative policy. In

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embodied in the Acts, "no discretion was given to the private parties, there was nothing remaining for the sovereign to supervise, and the requirement [of active supervision] was satisfied." P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 212.7c (Supp. 1994). The Cities' statement that the Acts leave no potential for state agency or public service commission review overlooks the fact that the Acts obviate the need for such review by attending to all the details in the first instance. *See* Cities' Petition at 16.

[10] The district court determined that the incorporated agreements contained "fixed rules" and merely divided service territories in different places than the general provisions of the Acts. *Remand Opinion* (Cities' Appendix B at 18a).

such cases, the state need not employ or rely on a subordinate state agency because the details of the regulatory program are contained in the statute. It would be a curious federalism indeed that required the state to use a subordinate agency whether one was needed or not.

The Cities improperly invoke the "gauzy cloak" references from *Midcal*. (Cities' Petition at 16, 20). According to the Cities, immunity is inappropriate here because the incorporated agreements "were merely ratified or rubber-stamped by the Alabama Legislature," and thus the sovereign merely authorized private parties to violate the Sherman Act. (Cities' Petition at 20). Even if the incorporated agreements originated with private parties, however, the State made them its own by including them in the Acts. The federalism concerns that underlie *Parker* require that states remain free to enlist private initiative in implementing state policies. *See Parker*, 317 U.S. at 352 (producer-proposed marketing plan); *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (auto dealer objections triggered state review). This is not a case in which the Legislature blindly authorized future territorial allocations by electric suppliers; rather, the Legislature wove into its regulatory program a number of specific, existing, fixed agreements which it found served the policies of the Acts.[11]

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[11] Professors Areeda and Hovenkamp have pointed to *Municipal I* to illustrate a self-executing statute. An example put forth by these commentators drew a distinction between instances where a legislature approved previously drawn territorial divisions (entitled to *Parker* immunity) and instances where a legislature merely allowed private parties "subsequently to draw up boundaries by mutual agreement . . . ." P. Areeda and H. Havenkamp, *Antitrust Law* § 212.7e (Supp. 1994). In the latter case, "the [active] supervision requirement would be met only if a state regulatory agency with appropriate power to disapprove were required to approve or at least empowered to disapprove the proposed boundaries . . . ." *Id.* Of course, the incorporated agreements involved in this case were approved by the Legislature after they were executed and those agreements which allow for subsequent modifications have been held

The notion of a self-executing statute that satisfies the active supervision requirement is well grounded in state action precedent. In fact, this Court suggested precisely such a possibility in *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344-45 n.6 (1987) ("[a] simple 'minimum markup' statute requiring retailers to charge 112 percent of their actual wholesale cost may satisfy the 'active supervision' requirement . . ."). A more recent decision by the New York Supreme Court Appellate Division expressly adopted the theory that a self-executing statute could satisfy the active supervision test. *Jetro Cash & Carry Enterprises v. Dept. of Taxation & Fin.*, 605 N.Y.S.2d 538, 540 (N.Y. App. Div. 1993) (statute regulating resale price of cigarettes defined the price with reference to manufacturers' price; therefore, by creating a detailed mechanism the state met the active supervision requirement). The Acts, including the incorporated agreements, are exhaustively detailed, providing the requisite active supervision to a degree at least equal to that present in *324 Liquor Corp.* and *Jetro.*

### 2. *The lower courts properly credited express statements in the Acts that the Legislature reviewed the incorporated agreements and found them not to be inconsistent with the Acts' purposes and policies.*

In reaching its conclusion that the incorporated agreements met the active supervision requirement, the district court looked to the express determinations by the Legislature, as found in the text of the statute, and concluded that the Legislature had in fact reviewed the agreements. According to the Acts, the incorporated agreements were "reviewed by the legislature, determined to be in the public interest, and found not to be inconsistent with the purposes and policies set forth" in the Act. *Ala. Code*

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to require the approval of the Legislature before such modifications may become effective.

§§ 37-14-8; 37-14-36. The district court declined "to go behind the legislature's statements. . . ." *Remand Opinion.* (Cities' Appendix B at 16a).[12] The circuit court properly affirmed the district court's ruling. *Municipal II*, 21 F.3d at 386.

Despite the clear and unequivocal statement of the Legislature's findings, the Cities argue that the "Legislature tacitly admitted the paucity of its scrutiny or involvement in its finding expressed in the legislation that the private agreements had been 'found not to be inconsistent with the purposes and policies set forth in . . . [the Acts].'" (Cities' Petition at 23) (quoting the Acts). The language of the Acts in no way acknowledges shortcomings in the Legislature's review. More importantly, however, the Cities' position represents a frontal assault on the integrity of the Legislature's explicit pronouncements. Nor is the Cities' claim supported by the facts of this case. Passage of the Acts was preceded by significant legislative study. A comparison of the two Acts also reveals a number of changes in the legislation, some of which arose directly from an earlier (now vacated) determination that the 1984 Act raised state constitutional concerns. With respect to the provisions in the Acts relating directly to the incorporated agreements, the deletion and addition of certain incorporated agreements[13] and other changes[14] evidence political give-and-take in the formulation of the Acts.

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[12] The Cities argue that "no review of the agreements occurred" (Cities' Petition at 20), and that the Acts contemplated only the "potential for legislative scrutiny of the private agreements." (*Id.* at 23). In other words, the Cities charge that the sovereign Legislature of the State of Alabama misstated the facts in the text of the statute. The principles of federalism underlying *Parker* cannot countenance such disrespect of the state as sovereign.

[13] One agreement was deleted and four were added.

[14] In the 1985 Act, the Legislature deleted language from the 1984 Act that limited the period in which incorporated agreements could be submitted for legislative approval.

The Cities attempt to have this Court dive headlong into the nuances of the Alabama legislative process by alleging that there was no record that all of the incorporated agreements were delivered to the Clerk of the House and the Secretary of the Senate and no record that members of each house had been notified about the availability of the agreements. (Cities' Petition at 23). If any such procedural irregularities occurred (and APC submits they did not), they may be addressed in the Montgomery County Action. Even if they did occur, such procedural shortcomings would carry no antitrust significance, and consideration of them would inappropriately immerse this Court in Alabama legislative procedure.[15]

Far from declining to credit express legislative findings, Alabama courts have ruled that "[w]hen [a] statutory pronouncement is clear and not susceptible to a different interpretation, it is the paramount judicial duty of a court to abide by that clear pronouncement." *Macon*, 613 So.2d at 320 (quoting *Parker v. Hilliard*, 567 So.2d 1343, 1346 (Ala. 1990)). Because the statement of legislative findings challenged by the Cities is absolutely clear and capable of only one interpretation, the lower courts were correct in affording the incorporated agreements with the same degree of respect given to the balance of the Acts.[16]

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[15] The attempt by the Cities to draw the federal courts into the internal affairs of the Legislature is made all the more inappropriate by the fact that "Alabama does not preserve committee reports, or the debates that surround the adoption of legislation . . . ." *Macon v. Huntsville Utilities*, 613 So.2d 318, 320 (Ala. 1992). Thus, although the Supreme Court of Alabama has conceded its inability to review the legislative history of a particular statute, the Cities would have the federal courts attempt such a feat. *See id.*

[16] The Eleventh Circuit, in *Municipal II*, considered the arguments raised by the Cities and found that the Cities' claim was "patently meritless." *Municipal II*, 21 F.3d at 386 n.4 (citing *Hoover* and *Omni*).

### 3. *The decisions below do not conflict with* Ticor *and do not create a conflict among circuits.*

The Cities assert that the district court erred in relying upon a decision by the First Circuit Court of Appeals in *New England*, 908 F.2d 1064 (1st Cir. 1990), and a decision of the Third Circuit Court of Appeals in *Ticor*, 922 F.2d 1122 (3d Cir. 1991) *cert. granted sub nom., FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 47 (1991), *reversed* 112 S. Ct. 2169 (1992). The Cities fail to point out, however, that the district court actually used the same exposition of the active supervision prong as did this Court in *Ticor*. Both the district court in this case and this Court in *Ticor* referred to the same description of the active supervision test, drawing from the Court's earlier words in *Patrick* ("active supervision . . . mandates that the state exercise ultimate control over the challenged anticompetitive conduct . . . . The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.") *Patrick*, 486 U.S. at 101. Thus, the district court adopted the appropriate standard which required it to "determine whether the terms of the agreements ensure[d] that state officials [had] and exercise[d] the authority to review any action taken under the incorporated agreements by the parties thereto." *Remand Opinion.* (Cities' Appendix B at 16a).

In their effort to read the decision below as one that is contrary to *Ticor*,[17] the Cities take considerable liberty with the *Ticor* opinion. Among other things, the Cities misread *Ticor* to require federal courts to probe the legislative process that produced the state legislation relied upon as a source of state action immunity. (Cities' Petition at 20). A comparison of *Ticor* and the present case reveals that *Ticor* did not involve direct supervision by

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[17] *See* Cities' Petition at 20 ("the decisions below are directly contrary to . . . *Ticor*").

the Legislature, arose in a much different factual setting, and resulted from regulatory inaction (in the context of a "negative option" regulatory regime) rather than affirmative legislative action of the type involved here.[18]

The fundamental difference between *Ticor* and this case, of course, is that in this case the Legislature did act—it made a specific, affirmative decision to include the incorporated agreements in the Acts through the exercise of its sovereign power to enact legislation. Moreover, the Legislature did not blindly approve unspecified future agreements; it approved specific agreements that were detailed and fixed at the time they were incorporated into the Acts. The Legislature was careful to restrict the addition of new agreements later and required that such agreements receive express legislative sanction. This is not a case in which regulatory inaction or potential regulatory intervention is proffered as a "substitute for a decision by the State" because here there *was* "a decision by the State." This Court's conclusion in *Ticor* that "whatever the potential for State regulatory review . . . active supervision did not occur" is simply not applicable to the affirmative action of the Legislature in enacting the Acts and expressly declaring legislative findings concerning the incorporated agreements.

The Cities also minimize the fact that the relevant state decisionmakers in *Ticor* were state insurance officials, not the members of the Legislature in the affected states.[19]

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[18] The negative option system involved in *Ticor* allowed rates to become effective without state action unless rejected by state regulatory bodies. The Acts employ no such mechanism.

[19] In attempting to foster the perception of a conflict between *Ticor* and the decisions below, the Cities cite *Yeager's*, 22 F.3d 1260, and *DFW Metro Line Servs. v. Southwestern Bell Tel. Corp.*, 988 F.2d 601 (5th Cir. 1993), *cert. denied sub nom., United States Metroline Servs. v. Southwestern Bell Tel. Co.*, 114 S. Ct. 183 (1993). Both of the decisions cited by the Cities involved supervision by a state commission or a regulatory agency, as opposed to active supervision by the state sovereign itself.

Nothing in *Ticor* indicates, and *Ticor* certainly does not hold, that the active supervision analysis requires an assessment of the level of diligence of the legislators who voted for particular state legislation. This Court's state action decisions have never sanctioned such an inquiry. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3 n. 28 (Supp. 1994). The Cities' expansion of *Ticor* simply disregards this important distinction between direct action of the sovereign and action of its subordinate agencies. *See Hoover*, 466 U.S. at 567-68; *Cf. Omni*, 499 U.S. at 378 (distinguishing bribery of a single regulator from bribery of some members of the legislature).[20]

In a practical sense, the approach suggested by the Cities would send the federal courts cascading into the thought processes of legislators from a decade ago.[21] If the Court were to acept the Cities' view, there would be no manageable judicial standard by which such an inquiry could be conducted in the highly political context of the legislative process. For this same reason, the Court has declined to sanction a state action standard that would turn on whether bribery or corruption entered the legislative process. *See Omni*, 499 U.S. at 378-79 (Sherman Act does not regulate political activity).

As early as 1810, the Court questioned the very competence of the federal judiciary to embark on the kind of

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[20] The Cities' position also would create enormous evidentiary problems associated with discerning whether the legislature's consideration was sufficient. *See United States v. Public Utilities Comm'n*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring) (statute should be interpreted by analysis of statute rather than by "psychoanalysis of Congress"); *James v. Todd*, 267 Ala. 495, 506, 103 So.2d 19, 28 (1958) (the judiciary will not inquire into the motives or reasons of legislature or the members thereof).

[21] The lack of recorded legislative history in Alabama would make this an unrealistic, if not impossible task. *See Macon.* Without recorded legislative history, there could be no credible support for the Cities unqualified assertion that, "[n]o review of the [incorporated] agreements occurred." (Cities' Petition at 20).

inquiry into motives urged by the Cities. *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 130 (1810) (cited in *Omni*, 499 U.S. at 378). If federal courts are ill-equipped to examine or evaluate the effect of corruption on the legislative process, surely they are much more ill-equipped to distinguish "superficial" legislative review from a "critical examination" by each legislator, to weigh the "sufficiency" of legislative debate, or to gauge the quality of state legislative review. Even if some legislators' review had been superficial, there would be no means of determining whether those deficiencies tainted the deliberative process as a whole. Obviously, the Cities' position would create an insurmountable problem of determining, in the legislative arena, how much debate is enough or how much knowledge of the facts the legislators must have. These problems would be aggravated in a state such as Alabama where no complete legislative history is maintained.

Justice Kennedy's opinion in *Ticor* was clearly limited to the circumstances of the case then before the Court—a case of "agency inaction" and the "clear absence of state supervision." *Ticor*, 112 S. Ct. at 2180. In fact, in the concluding paragraphs of the opinion, Justice Kennedy specifically cautioned that the Court's decision was to be read in light of the particular circumstances before the Court. *See id.* In doing so, he distinguished the Courts's prior decisions in *Omni, Fisher* [22] and *324 Liquor Corp.* and made it clear that *Ticor* did nothing to undermine the Court's holdings in those cases. *See id.* It is noteworthy that each decision distinguished in *Ticor* entered into the Eleventh Circuit's application of the active supervision test to the Acts' general provisions prior to remanding the case for consideration of the incorporated agreements. *Compare Municipal I*, 934 F.2d at 1504 (citing *324 Liquor Corp.* 479 U.S. at 344 n. 6) *with Ticor*, 112 S. Ct. at 2180 (citing *324 Liquor Corp.* 479 U.S. at 344 n. 6). *Ticor* does not require, and federalism

[22] *Fisher v. City of Berkeley*, 475 U.S. 260 (1986).

principles would not permit, dissecting the legislative process in the manner urged by the Cities.

The Cities' position before this Court urges precisely the sort of analysis of legislators' subjective intent and "deconstruction of the governmental process" that was explicitly condemned in *Omni*. *See Omni*, 499 U.S. at 377. The *Ticor* opinion should not be read so broadly, and nothing in that opinion undermines *Omni*'s admonition that *Parker* "was not meant to shift [the public interest] judgment from elected officials to judges and juries." *Id.* The Cities' reading of *Ticor* is plainly wrong because *Ticor* cited *Omni* with approval in the portion of its opinion explaining that the Court's holding should not be broadly interpreted outside the circumstances of negative option regulatory schemes. *See Ticor*, 112 S. Ct. at 2180.

The Cities' expansive view of *Ticor* disregards many fundamental tenets of the state action doctrine from cases that *Ticor* either cited or left intact. In *Hallie*, 471 U.S. at 44 n.7, for example, this Court cautioned against embroiling the federal courts in the unnecessary interpretation of state statutes. Ignoring this admonition, the Cities challenge the lower courts' interpretation of the incorporated agreements and the Acts, the Legislature's failure to read the agreements in open session, and the level of pre-enactment review of the agreements (Cities' Petition at 8-9, 11 & n.8, 14 & n.10, & 23). Similarly, in *Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 57 n.21 (1985), this Court cautioned against a state action test which would prompt the kind of interference with state sovereignty that *Parker* was intended to prevent. The Cities urge this Court to embroil the federal courts, not only in detailed interpretation of state statutes but also in extensive analysis of the political debate and process that produced those statutes. This ereroneous view is out of step with the Supreme Court's obvious deference to state legislative process. APC re-

spectfully submits that *Ticor* contemplated no such wholesale abandonment of prior state action precedent.

#### 4. *The lower courts applied the proper standard of statutory interpretation with regard to those agreements that allowed for future modifications.*

The Cities continue to pursue an argument that some of the incorporated agreements allow for "unsupervised private discretion." (Cities' Petition at 21, 24-25). The Cities' argument is without merit. The district court reviewed those incorporated agreements, which, according to the Cities, allowed for unsupervised modifications. The court then read those agreements in *pari materia* with the incorporating provision of the 1985 Act and determined that any subsequent modifications to those agreements "must be approved by the Legislature." This determination directly contradicts the Cities' argument that "any state corrective action or oversight of the agreements was theoretical at best." (Cities' Petition at 21).

As noted by the Eleventh Circuit, the federal courts are required to "look to state rules of statutory construction." *Municipal II*, 21 F.3d at 387. Under Alabama law, "[w]here the validity of a statute is assailed and there are two possible interpretations, by one of which the statute would be unconstitutional and by the other would be valid, the courts should adopt the construction which would uphold it." *House v. Cullman County*, 593 So.2d 69, 72 (Ala. 1992) (quoting *Alabama State Federation of Labor v. McAdory*, 246 Ala. 1, 10, 18 So.2d 810, 815 (1944), *cert. dismissed*, 325 U.S. 540 (1945)). *See also Baldwin County v. Jenkins*, 494 So.2d 584, 588 (Ala. 1986) ("Where a statute may be given two reasonable constructions, this court should apply the construction which will uphold, and not defeat, the legislative will.") *See NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (The cardinal principle of statutory construction is to save and not destroy). The courts below

simply followed the mandate of Alabama law and interpreted the Acts and the incorporated agreements in a way that saved rather than destroyed. This is not "creative interpretation, but merely adherence to long-established principles of statutory construction.[23]

## II. *PARKER* AND ITS PROGENY PROPERLY MAINTAIN THE FUNDAMENTAL BALANCE OF FEDERALISM PRINCIPLES AND ANTITRUST LAW AND, IN ANY EVENT, THIS CASE DOES NOT PRESENT AN APPROPRIATE SETTING TO REVISIT *PARKER*.

Contrary to Cities' assertion, the decisions below do not represent "the carving out of an exception to *Ticor* and *Midcal*".( Cities' Petition at 26). In both *Municipal I* and *Municipal II*, the Eleventh Circuit applied *Midcal* as refined in *Patrick* and concluded that the Acts "[place] no decision-making authority over restraints on competition in the hands of private parties," that the Acts "eliminate virtually all discretionary behavior" by electric suppliers, and that the Acts' incorporation of the specified agreements likewise entailed explicit legislative approval of customer allocations, *Municipal I*, 934 F.2d at 1503; *Municipal II*, 21 F.3d at 387. The court of appeals invoked no special rule merely because "state legislation is involved." (Cities' Petition at 26). Nonetheless, as noted in Part IA, because the Cities principally challenged the Legislature's conduct and the legislative process, satisfaction of the *Midcal* standard was not necessary.

Nor did the lower court expand the scope of *Parker* by refusing to weigh the independence and quality of the

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[23] The Cities' argument that electric suppliers have failed to exchange maps within the time prescribed by the Acts (Cities' Petition at 21) is likewise insufficient to preclude immunity. The maps do not draw the boundaries. The Legislature has already done that. The maps simply confirm the location of the boundaries as a ministerial item of convenience. Moreover, this argument applied, if at all, to the Acts' general provisions, and not to the incorporated agreements. *See Municipal I*, 934 F.2d at 1504.

Legislature's deliberative process, or refusing to disregard the Acts' explicit findings concerning the incorporated agreements. *See Municipal II*, 21 F.3d at 387-88 n.4 (relying on *Midcal, Hoover* and *Omni*). Such an inquiry would be unworkable and completely unsupported in this Court's pronouncements. The Acts unquestionably embody the sort of "deliberate state intervention" needed to demonstrate that the anticompetitive effects of the Acts are "the State's own," not those of private parties. *See Ticor*, 112 S.Ct. at 2177.[24] This Court has consistently declined to dilute the federalism underpinnings of *Parker*,[25] and it should not now change the way federalism concerns and antitrust policy have been balanced for more than fifty years. No novel issue is presented by the decisions below and no additional guidance is needed.

Perhaps recognizing that existing state action precedents firmly support the decision below, the Cities urge the Court "to revisit the state action doctrine." (Cities' Petition at 17, 22-29). The Court should decline this invitation for two reasons. First, the Cities' proffered "revisitation" is not a refinement or fine tuning of *Parker*—it is a wholesale abandonment of the federalism that underlies *Parker*. *Compare* Cities' Petition at 17 (expressing concern that states will have "license to override the antitrust laws") *with Parker*, 317 U.S. at 350-51 (Sherman Act not intended to restrain state from "activities directed by its legislature"). Second, as the Cities' petition makes clear, this case turns not on the scope of the state action doctrine but on its application (i) to the lower courts' interpretation of the Acts, (ii) in light of claimed procedural irregularities surrounding the Acts' passage, and (iii) to the particular deliberations of Alabama legislators.

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[24] To suggest, as the Cities do, that the Acts represent "private action 'masquerading' as action of the states" (Cities' Petition at 19) is to ignore the critical fact that the competitive restraint in this case comes directly and solely from the sovereign act of the Legislature.

[25] *See, e.g., Hoover*, 466 U.S. at 574, 580.

The Cities' Petition is replete with citations of Alabama legislative history and Alabama constitutional provisions, and factual assertions concerning the deliberations that produced the Acts. At best, review of this case would embroil the Court in the intricacies of Alabama law. Review would do little to advance the evolution of the state action doctrine.

## CONCLUSION

For the reasons stated herein, a writ of certiorari should be denied.

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No. 94-956

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE MUNICIPAL UTILITIES BOARD
OF ALBERTVILLE, ALABAMA, *et al.*,
*Petitioners*,

v.

ALABAMA POWER COMPANY, *et al.*,
*Respondents*.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

# REPLY BRIEF OF PETITIONER CITIES

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## REPLY BRIEF OF PETITIONER CITIES

Petitioner Cities reply to briefs in opposition to *Certiorari*. In their Petition and below, Cities alleged that Respondent power companies and cooperatives entered into agreements to divide territories for the sale of electricity in violation of the Sherman Act.

In response to the opposition briefs, Cities reply 1) that Cities contest *only* Respondents' actions; 2) that, under *Parker*,[1] Respondents cannot claim immunity for private actions that violate the Sherman Act where the state merely seeks to ratify trade restraints; 3) that Respondents' actions are subject to and fail scrutiny under *Midcal*;[2] 4) that the absence of state agency review requires an even more rigorous examination of the legislature's

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[1]*Parker v. Brown*, 317 U.S. 341 (1943).
[2]*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

alleged supervision of the Respondents' conduct; and 5) that this evaluation can be made by examining the acts, not the motives of the legislature.

If the opinion below is permitted to stand, a dangerous, unintended expansion of the state action doctrine will result. Without summary reversal or full review by this Court, antitrust violators will have a new pathway for immunizing private agreements in restraint of trade whenever the violators are powerful enough to obtain protective legislation.

## I. PETITIONERS CHALLENGE ACTIONS OF RESPONDENTS, NOT OF THE STATE

In their briefs, Respondent power companies contend that Petitioners are attacking actions of the state.[3] Peti-

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[3] *Alabama Power Company* ("APC Brief") at 10; Alabama Rural Electric Association of Cooperatives ("Alabama Rural Brief") at 8-9; Black Warrior Electric Membership ("Black Warrior Brief") at 5-6.

tioners are instead attacking the conduct of Respondents to divide territories. After agreeing to divide territories, Respondents sought antitrust immunity on their own behalf to enter into the territorial agreements and to implement them.[4] Petitioner Cities contest Respondents' claim of immunity under the state action doctrine for their *private* acts. As this Court stated in *Ticor*,

> [a]ctual state involvement, not deference to private [agreements] under the general auspices of state law is the precondition for immunity from federal law.

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[4]In their complaint, Petitioners did allege that the conduct of state officials was such as to fall within the "co-conspirator" exception to *Parker*, 317 U.S. at 351-352. After this Court held in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), that the co-conspirator doctrine does not limit the state action doctrine, the 11th Circuit withdrew its decision holding that Petitioner Cities had alleged a valid co-conspirator claim. The unavailability of a limitation to the *Parker* state action doctrine in situations where the state and private parties are co-conspirators makes it more important that the *Midcal* requirements of "clear articulation" and "active supervision" be strictly applied.

*FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169, 2176-77 (1992).

## II. *PARKER* DOES NOT PERMIT STATES TO AUTHORIZE ANTITRUST VIOLATIONS

The *Parker* doctrine permits states to enact regulatory legislation or to order monopoly service to substitute for competition. *Ticor*, 112 S.Ct. at 2176-77. To resolve the tension between *permitting* states to pass economic legislation that limits the operations of the market place and *preserving* the force of federal antitrust laws, *Parker* establishes that:

> a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful...

317 U.S. at 351. This principle remains the cornerstone of the *Parker* doctrine. *See, e.g.*, cases in Cities' Petition at 18-19.

Despite Respondents' characterizations, the Territorial Acts serve to ratify private anticompetitive conduct. Petitioners contend that Respondents 1) entered into overall agreements to divide markets; 2) incorporated by reference additional private territorial agreements as part of their overall market agreement; and 3) continue today to allocate customers privately and otherwise to implement their private agreements, all without any state supervision or review. Ratification of this type of trade restraint is manifestly impermissible under *Parker*. Were the law contrary, any industry would be free to fix prices, divide territories, or otherwise violate the antitrust laws if the industry were able to persuade a state to ratify its private, unlawful agreements. This thesis was rejected in *Parker*, was rejected in con-

nection with the related *Noerr-Pennington* doctrine,[5] and must be rejected here.

## III. RESPONDENTS' ACTIONS ARE SUBJECT TO THE *MIDCAL* TWO-PRONG TEST

Respondents rely on *Hoover v. Ronwin*, 466 U.S. 588 (1984), as exempting all actions undertaken by the state legislature from the two-part test of *Midcal*.[6] Respondents claim that when a state acts by legislation, the requirements of *Parker*, *Midcal* and *Ticor* do not apply.[7]

While the state action doctrine of *Parker v. Brown* does not normally reach the *actions* of the states themselves, the doctrine is crystal clear that the *Midcal* test must be stringently applied when

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[5] *E.g.*, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 425 (1993), explaining *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). *See* Petition at 12, 15-16.

[6] APC Brief at 10; Alabama Rural Brief at 8; Black Warrior Brief at 6.

[7] Alabama Rural Brief at 8; Black Warrior Brief at 5-8.

analyzing *private* anticompetitive agreements and conduct allegedly protected by state action. *Midcal*, 445 U.S. 97. *Midcal* and subsequent cases require clear articulation of state policy and meaningful supervision to ensure that actions otherwise illegal under the antitrust laws are, in fact, implementing decisions of the state, and are not simply furthering the interests of private parties.[8] The cited cases provide no exception merely because the state acts by legislation.

**A. Summary Reversal Is Warranted**

This case comes to this Court from the rulings of the courts below on Respondents' motions to dismiss or for summary judgment.[9] Petitioners seek summary reversal under *Ticor*, particularly

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[8]*E.g.*, *Ticor*, 112 S. Ct. at 2176-77; *Patrick v. Burget*, 486 U.S. 94 (1988); *Midcal*, 445 U.S. at 105.

[9]Appendix A, 4a; Appendix B, 10a, 13a.

because the district court relied upon the Third Circuit's overturned *Ticor* opinion and the First Circuit's displaced opinion in *New England Motor Rate Bureau*.

Alabama Power Company argues that the district court adopted the appropriate active supervision standard.[10] To the contrary, the district court stated 1) that a federal court should not "scrutinize the rigor with which the state supervises the challenged activity to ensure that supervision is more than pro forma" *[quoting New England Motor Rate Bureau v. FTC*, 908 F.2d 1064, 1076 n. 18 (1st Cir. 1990)] and 2) that the "[a]vailability of the state action doctrine does not depend upon the quality of state supervision." [*quoting Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3rd Cir. 1991)]. (Appendix B,

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[10]APC Brief at 20. *See also* Alabama Rural Brief at 10-11.

19a-20a). As the May 23, 1994 Eleventh Circuit decision does not mention this Court's *Ticor* decision or otherwise cure the inappropriately applied supervision standard, summary reversal is warranted.

B. **The Acts Are Not Self-Executing**

Even applying *Ticor* correctly, there is insufficient supervision of the future conduct of the private parties. Respondents contend that the Territorial Acts are "self-executing" because the legislature has already decided the territorial boundaries.[11] However, the legislation provides no supervision of either past or future divisions of service territories or of customer allocations allegedly pursuant to them. Delivery points for retail electric service customers are hardly immutable. Each new residential or commercial

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[11]APC Brief at 15; *see also* Black Warrior Brief at 9.

building constructed near a territorial dividing line must be allocated to a specific electric supplier. This allocation will be done privately. Moreover, the statutory scheme does not even require boundary maps to be filed with any state agency or for any other public access to the maps, thereby eliminating any practical possibility for state supervision.[12]

Although the Respondent utilities, and the lower courts, interpret the Territorial Acts to require subsequent legislation whenever any party desires to

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[12]Further, the Acts' general requirement that new service be provided by the electric supplier whose January 1, 1984 distribution lines were "closer to" the premises to be served is deceptively imprecise. Ala. Code §§ 37-14-3(1), 37-14-32(1) (76a-77a; 101-102a). The Acts also permit the private parties to terminate the individual agreements on their own accord, thereby binding the parties to the allocations of the overall territorial agreement. Ala. Code § 37-14-36 (1992)(116a). As long as private parties are able to determine in their discretion when the agreements are terminated and, correspondingly, when the overall agreement comes into force, the parties control how territories are divided. *See also* Section V, *infra*.

change a private agreement, no mechanism is provided under which the state or any outside party can determine how customers are allocated. Private parties wanting electric service cannot be expected to wait for service until the legislature is in session. Grafting a requirement for subsequent legislative approval onto the entire Act, as well as the individual incorporated agreements, presumes that an imaginary trigger exists to notify the state or outside parties of changes to service designations or violations of the agreements. This is not even the gauzy cloak of *Midcal*.[13]

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[13]Areeda and Hovenkamp comment that the supervision requirement would only be met for private, subsequently drawn boundaries if a state regulatory agency with appropriate power "was required to approve or at least empowered to disapprove the proposed boundaries." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 212.7c (1994 Supp.). They have not, as implied by Respondent Alabama Rural Electric Association of Cooperatives (Alabama Rural Brief at 11), commented on Petitioners' specific contention that the individual agreements are not actively supervised.

### C. The Territorial Agreements Are Not The State's "Own"

Respondent Alabama Power Company contends that

> even if the incorporated agreements originated with private parties, however, *the State made them its own by including them in the Acts.*

APC Brief at 16 (emphasis added).

The market divisions, allegedly immunized by the legislative finding that they were "not inconsistent" with the purposes of the Acts, are no more the legislature's own than were the title insurance rates allowed to take effect pursuant to the "negative option" provisions at issue in *Ticor*. Where the private agreements that the legislature has allegedly made "its own" are not contained in the legislation, are not public documents or available in a public repository, and are not deemed by the legislature to be consistent with the purposes and poli-

cies of the legislation (but rather only "not inconsistent"), the active supervision prong of *Midcal* is not met.

## IV. THE ABSENCE OF A REGULATORY SCHEME REQUIRES STRICT ADHERENCE TO *MIDCAL*

Respondents imply that the legislature does not need to be held to the same standard of active supervision as a regulatory agency created by it would be. To the contrary, the absence of state agency review requires an even more rigorous examination of alleged supervision. Without a designated state agency to supervise future private conduct, antitrust violators are even more free to restrain trade.

Starting with *Parker*, this Court has recognized the importance of having a clear mechanism to ensure that protected conduct is that of the state. *Accord*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). In *Parker*, the legislation at

issue established a state proration program for marketing raisins. The program

> derived its authority and efficacy from the legislative command of the state and *was not intended to operate or become effective without that command...*

317 U.S. at 349 (emphasis added).

This Court amplified the importance of having supervisory mechanisms in *Midcal*; there, this Court explained why the statute failed to immunize the wine producers' and wholesalers' conduct:

> The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program.

445 U.S. at 105-06 (citations omitted).

Even *Hoover* reinforces the need for meaningful state regulation to exempt private parties from antitrust actions.

In that case, this Court rejected the claim that a state statute dealing with bar admissions violated antitrust laws. However, in doing so, the Court made clear that the bar committees'

> authority was limited to making recommendations to the Supreme Court. The court itself made the final decision to grant or deny admission to practice.

*Hoover*, 466 U.S. at 572-573.[14]

Where a state legislature undertakes this supervisory authority, it must be real. Private parties claiming immunity must be able to prove that the legislature has not simply "ratified," and left unattended, their anticompetitive conduct.

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[14]This Court stressed that there was a "detailed mandatory review procedure by which an aggrieved candidate could challenge the Committee's rating formula" (*Id.* at 573); that the "disappointed applicant" could seek "individualized review" by the court (*Id.* at 576); and "that under the law of Arizona only the State Supreme Court had authority to admit or deny admission to practice law." (*Id.* at 581). Here, the Alabama Legislature does not make decisions of who will sell where, especially with respect to implementing the private agreements.

## V. THE COURT NEED NOT EXAMINE THE LEGISLATURE'S MOTIVES

Contrary to Alabama Power Company's response, Petitioners advocate examination of *what the legislature did* (*i.e.*, the legislation itself and the consequences of that legislation), not of the legislature's motivations. On their face, the Alabama Territorial Acts leave ample ground for the exercise of private, unsupervised utility discretion. Electric suppliers other than municipal electric suppliers may (not must) serve large customers outside city limits without regard to designated service territories and without regard to electric line duplication[15] -- the alleged articulated state policy. Municipalities may (not must) buy facilities of secondary electric suppliers

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[15]Ala. Code §§ 37-14-3(2)(3), 37-14-32(2)(3) (Appendix H, 77a; Appendix I, 102a).

within their 1984 corporate limits, but secondary suppliers may (not must) continue to serve large customers within those corporate limits.[16] Scrutiny of legislative motives is not required to determine that such discretion exists.

Moreover, passage of the Acts was subject to procedural irregulatory. The texts of the individual private agreements are not included in the language of the Acts.[17] There is no evidence that all of

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[16]Ala. Code §§37-14-4, 37-14-4(3); 37-14-33(3). (79-84a; 105-112a).

[17]Petitioners' Alabama counsel knows of no other instance wherein the Alabama Legislature incorporated into legislation by reference private agreements. The universal rule appears to be that incorporation by reference is limited to statutory provisions or public documents. Lawrence Filson, *The Legislative Drafter's Desk Reference*, §25.5 (1992). One Respondent points to the existence of statutes in other states enacting permanent boundaries or service areas for electric suppliers. Alabama Rural Brief at 3-4. Counsel notes, however, that none of these statutes incorporates by reference private, territorial agreements of individual suppliers.

A number of the states which Respondent cite as "providing for permanent boundaries or service areas for electric suppliers" actually involve ongoing supervision and revision by regulatory agencies. *See e.g.*, Ga. Code Ann. §46-3-13

the incorporated agreements were ever delivered to both houses of or considered by the Alabama Legislature. And, the private agreements never received the mandatory legislative readings, as did the Acts. (R3-78; Appendix 5) (in separate envelope). At minimum, these facts require strict adherence to the active supervision standard of *Midcal*.[18] This

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(Michie 1992); Iowa Code § 476.25 (1993); Minn. Stat. § 216B.39 (subdiv. 3)(1992 & Supp. 1993); N.C. Gen. Stat. §62-110.2(d)(2) (1994); Ohio Rev. Code Ann. § 4933.83(c)(Baldwin 1991); S.C. Code Ann. §58-27-650 (Law Co-op 1977 & 1993 Supp.); and Wis. Stats. § 196.495(b)(1993). If Respondent's purpose in citing these statutes is to suggest that lesser standards for competition in the electric utility industry should apply, *see* Cities' Petition, at 27-28. Indeed, there is renewed recent interest in possibilities for increased retail electric competition. *E.g.*, Peter Passell, *A Makeover for Electric Utilities*, New York Times, February 3, 1995, at D1; Phillip S. Cross, *Retail Wheeling -- Happy Motoring for State Regulators?*, Public Utilities Fortnightly, June 15, 1994, at 46.

[18]The district court quoted the stipulation of the parties in another case that the bills and delivered to were read in both houses of the Alabama Legislature (14a). However, not all of the agreements incorporated by reference in the Acts were enacted at the times of their "first readings." The legislature incorporated the Cullman Utilities Board/Cullman Electric Cooperative

scrutiny of primarily the language of the Acts does not unduly invade the legislative province where antitrust exemptions are at issue.

## CONCLUSION

If Petitioners properly understand *Ticor*, the court below should be summarily reversed. Alternatively, the Court should grant *certiorari*. The lower court's decision permits states to approve private trade restraints without limitation so long as they act through legislation. The decision below not only raises questions concerning the application of the law, but

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Agreement by reference despite the fact that the agreement was never provided either to the Clerk of the House or to the Secretary of the Senate. Although evidence of this omission was submitted to the district court (R2-66), the court nowhere mentions whether the Alabama Legislature had the Cullman agreement before passing the legislation. Although resolving this point is not necessary for decision in this case, *Parker*, *Midcal* and *Ticor*, and also *Cantor*, would seem to command that legislation cannot exempt private parties from the antitrust laws without even having before them the agreements sought to be exempted.

more fundamentally raises the question of what the law is. Properly balancing of the dual interests of avoiding injury to the national commerce through enforcement of the antitrust laws, on one hand, and permitting valid state economic regulation, on the other, mandates this Court's review.

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